HYDE

Land Warfare

1918

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LAND WARFARE

By

CHARLES CHENEY HYDE
Professor of Law in Northwestern University

WASHINGTON
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Part I. Belligerent Occupation
Part II. Preliminary Notes on the Law of Nations Applicable to an Army in the Field

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PART I.

BELLIGERENT OCCUPATION.

CONTENTS.

BELLIGERENT OCCUPATION.

BELLIGERENT OCCUPATION.[1]

a.

NATURE AND EFFECT.

Belligerent occupation is that stage of military operations which is instituted by an invading force in any part of an enemy's territory, when that force has overcome successful resistance and established its own military authority therein.[2] According to the Rules of Land Warfare of the United States Army, belligerent or so-called military occupation is a question of fact. It presupposes a hostile invasion as a result of which the invader has rendered the invaded Government incapable of publicly exercising its authority, and that the invader is in position to substitute and has substituted his own author-

[1] See generally documents in Moore (Dig. VII, 257-315); Instructions for the Government of Armies of the United States in the Field (Gen. Orders, No. 100, Apr. 24, 1863); Rules of Land Warfare, U. S. Army, 1917 (chap. VIII, Nos. 285-330); Charles E. Magoon (Reports on the Law of Civil Government in Territory Subject to Military Occupation by the Military Forces of the United States, Washington, 1903).

See also Sir G. S. Baker's 4 ed. of Halleck (Int. Law, 465-500); W. E. Birkhimer (Military Government and Martial Law, 2 ed. Kansas City, 1904); Percy Bordwell (The Law of War Between Belligerents, Chicago, 1908); Bonfils-Fauchille (7 ed. §§1155-1193); J. E. Conner, The Development of Belligerent Occupation (Bulletin of State University of Iowa, Apr. 6, 1912); Alessandro Corsi (*L'Occupazione Militare in Tempo di Guerra*, Florence, 1886); G. B. Davis (Sherman's 4 ed. 327-336); J. Depambour (*Des Effets de L'Occupation en Temps de Guerre*, Paris, 1900); J. E. Edmonds and L. Oppenheim (Land Warfare, London, 1912, Nos. 340-404); G. Ferrand (*Des Réquisitions en Matière de Droit International Public*, with prefaces by L. Renault and Intendant Gen. Thoumazou (including bibliography), Paris, 1917); Hall (Int. Law, 6 ed. 458-480); T. E. Holland (Laws of War on Land, London, 1908, Nos. 102-116); Robert Jacomet (*Les Lois de la Guerre Continentale*, with preface by L. Renault, Paris, 1913); Arthur Lorriot (*De La Nature de L'Occupation de Guerre*, Paris, 1903); A. Mérignhac (*Les Lois et Coutumes de la Guerre sur Terre*, Paris, 1903, 241-322); J. H. Morgan (The German War Book (*Kriegsbrauch im Landkriege*), London, 1915, 113-142); E. Nys (*Droit International*, III, 463-472); L. Oppenheim (Int. Law, 2 ed. II, 204-215, with bibliography); A. Pillet (*Les Lois Actuelles de la Guerre*, 2 ed. Paris, 1901, 237-272); J. B. Porter (Int. Law, 2 ed. Army Service Schools, Fort Leavenworth, 1914, 185-195); Raymond Robin (*Des Occupations Militaires en dehors des Occupations de Guerre*, with preface by L. Renault, Paris, 1913); Karl Strupp (*Das Internationale Landkriegsrecht*, Frankfurt am Main, 1914, 93-126, with bibliography); Hannis Taylor (Int. Law, §§568-579); Platon de Waxel (*L'Armée D'Invasion et La Population*, Leipzig, 1874); Westlake (Int. Law, 2 ed. II, 93-116); C. Phillipson's Wheaton (London, 1915, 519-545); G. G. Wilson (Int. Law, 329-343); A. Zorn (*Das Kriegsrecht zu Lande*, Berlin, 1906, 207-315).

See also M. Marinoni, "*Della Natura Giuridica Dell 'Occupazione Bellica*," with bibliography (*Riv. D. I.*, V, 181-268, 373-476); L. Oppenheim, "The Legal Relations Between an Occupying Power and the Inhabitants" (L. Q. Rev. XXXIII, 363); R. Ruze, "*La Jurisdiction des Armées D'Occupation*" (*Rev. Gén.* XVI, 134-161).

[2] This definition of belligerent occupation is substantially that given by J. E. Conner in The Development of Belligerent Occupation (Bulletin of State University of Iowa, Apr. 6, 1912, p. 3). That writer is believed to employ wisely the term "belligerent occupation" rather than "military occupation" or "hostile occupation" to describe the stage of military operations referred to in the text. He adverts to the fact that the occupation by a military force after a treaty of peace is essentially a military occupation, yet one differing vitally from that existing while war ensues. "With the period preceding peace," he declares, "since wars may be international, international law is much concerned, whether the occupation be considered as law or as comity. Hence, if military occupation be chosen to designate the later period it can not in international law be consistently applied to the earlier, and thus for the reasons above given, the term 'belligerent occupation' will be employed to designate a set of relations which partake of an international character to a greater degree than does 'military occupation.'"

ity for that of the legitimate government of the territory invaded.[1] It is said that invasion is not necessarily occupation, although preceding it and frequently coinciding with it; and that an invader may push rapidly through a large portion of enemy territory without establishing that effective control which is essential to the status of occupation. He may, it is declared, send small raiding parties or flying columns, reconnoitering detachments, etc., into or through a district where they may be temporarily located, and exercise control, yet when they pass on it can not be said that such district is under his military occupation.[2]

Belligerent occupation being "essentially provisional," does not serve to transfer sovereignty over the territory controlled, although the de jure sovereign is, during the period of occupancy, deprived of power to exercise any rights as such.[3] This deprivation of power and the relinquishment of it to the occupant are a direct effect of his achievement. The law of nations accepts the result as a fact to be reckoned with, regardless of the merits of his cause. There has developed, accordingly, a body of law indicating the scope of the rights of the occupant over the hostile territory and limiting his freedom of action. It indicates the test of the propriety of his conduct with respect to what is under his sway. While this law is essentially international in character and origin, it is none the less local, because it actually prevails where the occupant asserts his control.

In consequence of belligerent occupation, the inhabitants of the district find themselves subjected to a new and peculiar relationship

[1] The language of the text is that contained in Rules of Land Warfare, No. 286.

According to Article XLII of the regulations annexed to The Hague Convention of 1907, concerning the Laws and Customs of War on Land: "Territory is considered occupied when it is actually placed under the authority of the hostile army.

"The occupation extends only to the territory where such authority has been established and can be exercised." (Malloy's Treaties, II, 2288.)

"Such occupation is not merely invasion, but is invasion plus possession of the enemy's country for the purpose of holding it temporarily at least (2 Oppenheim, §167.)" (Day, J., in MacLeod *v.* United States, 229 U. S. 416, 425.)

See also Rules of Land Warfare, No. 289.

[2] See Rules of Land Warfare, No. 288.

According to No. 291 (id.): "The existence of a fort or defended area within the occupied district, provided such place is invested, does not render the occupation of the remainder of the district ineffective, nor is the consent of the inhabitants in any manner essential."

[3] See Thirty Hogsheads of Sugar *v.* Boyle (9 Cranch, 191); United States *v.* Rice (4 Wheat. 246); Fleming *v.* Page (9 How. 603).

See also Rules of Land Warfare, No. 287.

"Down to the middle of the eighteenth century the authority of an invader was not distinguished from conquest. The doctrine had not been established that the sovereignty over a territory and its population is not transferred till the end of a war, when it may pass by cession in the treaty of peace, or by conquest if all contest ceases and the war comes to an end without such a treaty, as happens when one of the belligerent states is extinguished. * * * Frederick the Great taught that the business of an invader in winter quarters was to raise recruits from the country by compulsion, and that was his practice as well as that of other commanders in the war of the Austrian Succession and in the Seven Years War. But now that the distinction between conquest and military occupation is firmly drawn, the source of an invader's authority can not be looked for in a transfer of that of the territorial sovereign. It is a new authority, based on the necessities of war and on the duty which the invader owes to the population of the occupied districts." (Westlake, 2 ed. II, 95, 96.)

to an alien ruler to whom obedience is due.[1] If he imposes penalties for disobedience, the law of nations is unconcerned so long as he does not violate those restrictions which it has established. Doubtless he enjoys the right to displace all forms of pre-existing authority, and to assume at will to such extent as he may deem proper, all of the functions of government.[2] The exercise of these broad privileges may give rise to controversy as to whether there has been an abuse of power; and this question is of more frequent occurrence than any inquiry as to the precise effect of belligerent occupation as such. If the occupant is guilty of such abuse, and resorts to internationally illegal conduct in his treatment of the persons or property within the district under his control, the de jure sovereign is believed to possess a solid right to demand full reparation upon the restoration of peace.[3] Otherwise a belligerent occupant would be a law unto himself, unconstrained by any restriction opposing his will, and any international system of law purporting to limit his freedom of action would have no significance save as a mere appeal to his beneficence.

The occupation of hostile territory by American military forces has at times resulted in judicial inquiry whether the President or a commanding officer has violated restraints imposed by the Constitution and laws of his country.[4] The question in such case is obviously of a domestic nature, and its solution is not necessarily dependent upon the extent of the rights of a belligerent occupant under the law of nations. Nevertheless, in construing and applying limitations imposed on executive authority, the Supreme Court of the United States has not hesitated to declare, when such was in its opinion the case, that they arose "from general rules of international law and from fundamental principles known wherever the American flag flies." [5] That tribunal has, moreover, been scrupulous, when construing executive orders and statutory ratification thereof, to respect manifestations of purpose by the President and the Congress to act within the limitations believed to be prescribed by that law.[6]

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[1] "The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of a new political power." (Order of President McKinley to the Secretary of War, July 18, 1898, on the occupation of Santiago de Cuba by the American forces (Correspondence Relating to War with Spain, I, 159; Moore, Dig. VII, 261.)

See also United States *v.* Rice (4 Wheat. 246, 254).

[2] See New Orleans *v.* Steamship Co. (20 Wall. 387, 393, 394), quoted in Dooley *v.* United States (182 U. S. 222, 231). See also MacLeod *v.* United States (229 U. S. 416, 425).

[3] It is believed that respect for this principle demands that de jure sovereigns and their allies opposing Germany in the European war, not only prefer claims against that State at the close of the conflict, on account of the abuses of its power while a belligerent occupant of hostile territory, but also require adequate assurance of ample reparation as one of the conditions of a treaty of peace.

[4] See the *Grapeshot* (9 Wall. 129, 133); Dooley *v.* United States (182 U. S. 222, 234–236; Moore, Dig. VII, 270–272).

See also Ochoa *v.* Hernandez (230 U. S. 139).

[5] See opinion of Mr. Justice Pitney in behalf of the court in Ochoa *v.* Hernandez (230 U. S. 139, 164, 165).

[6] See opinion of Mr. Justice Day in behalf of the court in the case of MacLeod *v.* United States (229 U. S. 416, 434).

Belligerent occupation must be both actual and effective. Organized resistance must be overcome and the forces in possession must have taken measures to establish law and order. It doubtless suffices if the occupying army can, within a reasonable time, send detachments of troops to make its authority felt within the occupied district. Nor is it material by what methods such authority is exercised, "whether by fixed garrisons or flying columns, small or large forces."[1]

It is not believed that a proclamation of military occupation is a legal necessity. The expediency, however, of such a proclamation must be obvious, and the practice of the United States is to issue one.[2] The Rules of Land Warfare advert to the fact that in the absence of a proclamation or similar notice, the exact time of commencement of occupation may be difficult to fix. The presence of a sufficient force to disarm the inhabitants or enforce submission and the cessation of local resistance, due to the defeat of the enemy's forces, is said to determine the commencement.[3]

Occupation once acquired must be maintained. In case the occupant evacuates the district or is driven out of the same by the enemy, or by a levee en masse, and the legitimate government actually resumes its functions, the occupation ceases. It does not cease, however, if the occupant, after establishing his authority, moves forward against the enemy, leaving a smaller force to administer the affairs of the district. Nor does the existence of a rebellion or the operations of guerilla bands cause it to cease, unless the legitimate government is reestablished and the occupant fails promptly to suppress such rebellion or guerilla operations. Belligerent or hostile military occupation ceases on the conclusion of peace.[4] If upon the restoration thereof territory which has been under belligerent occupation is transferred to the sovereign of the occupant, there may be a continuance in fact of military government therein.[5] From that

[1] See Rules of Land Warfare, No. 290, citing Edmonds and Oppenheim (Land Warfare, par. 344) and Jacomet (Les Lois, p. 69).

The military occupation by the United States, during and after the war with Spain, of the Philippine Islands, and the conduct of the military government thereof, did not extend to places which were not in actual possession of the United States until they were reduced to such possession. Thus executive orders regarding the collection of duties on goods imported into the Philippine Islands during the military occupation thereof did not apply to any ports, such as Cebu, during the time when they were not in the possession and under the control of the United States. (See McLeod *v.* United States, 229 U. S., 416.)

[2] See Rules of Land Warfare, No. 292, to which is appended the statement: "For practice in this country vide the proclamations of Gen. Kearney on Aug. 22, 1846; Gen. Taylor in Mexico, H. R. Executive Doc. No. 119, pp. 13-17; Gen. Scott in Mexico at Vera Cruz, Apr. 11, 1847; at Tampico, Feb. 19, 1847; G. O. No. 20, Feb. 19, 1847; and G. O. 287, Army Mex., Sept. 17, 1847; G. O. 101, W. D., July 18, 1898; Proc. Gen. Miles, July 28, 1898, as to Porto Rico; Proc. Gen. Merritt, Aug. 14, 1898, in Philippines."

[3] See Rules of Land Warfare, No. 293.

[4] The paragraph in the text reproduces Rules of Land Warfare, No. 294.

[5] See, for example, Santiago *v.* Nogueras (214 U. S., 260); also Cross *v.* Harrison (16 How., 164); Dooley *v.* U. S. (182 U. S., 222, 234).

circumstance it is not to be inferred, however, that belligerent occupation survives the final transfer of sovereignty.[1]

b.

The Administration of Occupied Territory.

(1)

LEGISLATIVE AND JUDICIAL FUNCTIONS.

In consequence of his acquisition of the power to control the territory concerned the occupant enjoys the right and is burdened with the duty to take all the measures within his power to restore and insure public order and safety.[2] In so doing he is given great latitude with respect to choice of means and mode of procedure. This freedom may be partly due to the circumstance that the occupant is obliged to consider as a principal object the security, support, efficiency, and success of his own force in a hostile land inhabited by nationals of the enemy.[3] Possessed of exclusive power to enact laws and administer them, the occupant must regard the exercise by the hostile government of legislative or judicial functions (as well as those of an executive or administrative character) as in defiance of his authority, except in so far as it is undertaken with his sanction or cooperation.[4] As a matter of practical expediency the occupant may be disposed to utilize certain existing agencies of that government and to suspend the operation of others. Thus, according to the practice of the United States, he will rely upon the existing tribunals, so far as may be possible, to administer the ordinary civil and criminal laws.[5] He will not, however, extend jurisdiction to such tribunals of crimes of a military nature and which affect the safety of the invading army.[6]

It must not be inferred, however, that the occupant is deterred by any rule of international law from pursuing a different course if the

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[1] After the change the relation of the new sovereign towards the territory concerned and the inhabitants thereof differs sharply from that existing when that territory, although occupied by the same forces, belonged to the enemy and was inhabited by its nationals.

[2] See Article XLIII of Regulations Annexed to The Hague Convention of 1907, concerning the Laws and Customs of War on Land (Malloy's Treaties, II, 2288).

[3] See Rules of Land Warfare, No. 299.

[4] See Rules of Land Warfare, No. 297.

According to Edmonds and Oppenheim, Exposition of Land Warfare for Guidance of Officers of the British Army, No. 359: "The legislative, executive, and administrative functions of the national government, whether of a general, provincial, or local character, cease on occupation. The civil servants and other officials of the local government may, if the occupant tacitly or expressly consent, continue to perform their ordinary routine duties, but except in case of military necessity they can not be compelled by force to do so."

[5] See order of President McKinley to the Secretary of War, July 18, 1898, on the occupation of Santiago de Cuba by the American forces (Correspondence Relating to War with Spain, I, 159; Moore, Dig. VII, 261).

See also Justin H. Smith, "American Rule in Mexico" (Am. Hist. Rev. XXIII, 287, 298) and documents there cited.

[6] See Rules of Land Warfare, No. 299, where it is also observed that the jurisdiction of the local courts is never extended to members of the invading army

conduct of the inhabitants, or any other consideration, should render such a step indispensable to the maintenance of law and order. In such case he may replace or expel native officials in part or altogether, or he may substitute new courts of his own constitution for the existing ones, or create such new or supplementary tribunals as may be necessary. "In the exercise of these high powers the commander must be guided by his judgment and his experience and a high sense of justice." [1]

The rights of the occupant as a law-giver have broad scope. He may not unlawfully suspend existing laws and promulgate new ones when the exigencies of the military service demand such action.[2] According to the Rules of Land Warfare, he will naturally alter or suspend all laws of a political nature as well as political privileges, and all laws which affect the welfare and safety of his command. Of this class are said to be those relating to recruitment in occupied territory, the right of assembly, the right to bear arms, the right of suffrage, the freedom of the press, and the right to quit or travel freely in the territory.[3] It is declared that the occupant may create new laws for the government of a country where none exists, and that he will promulgate such new laws and regulations as military necessity demands. In this class are said to be included those laws which come into being as a result of military rule—that is, those which establish new crimes and offenses incident to a state of war, and are necessary for the control of the country and the protection of the army.[4]

The right to legislate is not deemed to be unlimited. According to The Hague regulations of 1907, the occupant is called upon to respect, "unless absolutely prevented, the laws in force in the country."[5] Thus in restoring public order and safety he appears to be bound to make serious endeavor to continue in force the ordinary civil and criminal laws which do not conflict with the security of his army or its support, efficacy, and success.[6] The Supreme Court of

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[1] See President McKinley, order to the Secretary of War, July 18, 1898, on the occupation of Santiago de Cuba by the American forces (Correspondence Relating to War with Spain, I, 159; Moore, Dig. VII, 261).

[2] See Rules of Land Warfare, No. 300.

See also Magoon's Reports, 14.

[3] See Rules of Land Warfare, No. 301, where it is added that "such suspensions should be made known to the inhabitants." See also in this connection Edmonds and Oppenheim, Land Warfare, No. 362.

[4] See Rules of Land Warfare, No. 302, quoting extracts from various martial-law regulations of the Japanese in Manchuria.

[5] See Article XLIII (Malloy's Treaties, II, 2288).

See notes of the Belgian Government of Apr. 9, 1915, protesting against certain German modifications of Belgian laws (Stowell and Munro's International Cases, II, 150).

[6] See Rules of Land Warfare, No. 299.

"Though the powers of the military occupant are absolutely supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of persons and property and provide for the punishment of crime, are considered as continuing in force so far as they are compatible with the new order of things, until they are suspended or sequestrated by the occupying belligerent; and in practice they are not usually abrogated, but are allowed to remain in force, and are to be administered by the ordinary tribunals, substantially as they were before the occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion." (President McKinley, order to the Secretary of War, July 18, 1898, on the occupation of Santiago de Cuba by the American forces, Correspondence Relating to War with Spain, I, 159; Moore, Dig. VII, 261, 262).

the United States has declared by way of dictum that the conduct of an American military governor in Porto Rico in making an order, judicial in its nature, depriving any person of his property without due process of law, was not only without executive sanction, but also contrary to limitations arising from general rules of international law.[1] The Hague regulations of 1907 expressly forbid a belligerent to declare abolished, suspended, or inadmissible in a court of law, the rights and actions of the nationals of the hostile party.[2]

(2)

FISCAL AND OTHER MEASURES RESPECTING PROPERTY.

(*a*)

TAXES AND DUTIES.

The military occupant enjoys large freedom in the mode of raising revenues to defray expenses of administration, as well as in the application of funds acquired for that purpose. In the levying of taxes "for the benefit of the State," however, Article XLVIII of The Hague regulations of 1907, imposes the requirement that so far as possible the "rules of assessment and incidence in force" shall be observed, and that the occupant shall in consequence of collection be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was bound.[3] Circumstances may arise when through the fault of local officials such procedure becomes impracticable. In such event the occupant would appear to be excused from respecting local rules of assessment and incidence.[4] The Rules of Land Warfare of the United States, declaring the imposition of taxes to be an attribute of sovereignty, forbid the occupant to impose new taxes, obliging him to obtain additional revenues from other sources and through other channels.[5] Article XLIX of The Hague regulations of 1907 declares

[1] See Cchoa *v.* Hernandez (230 U. S. 139, 164, 165).

[2] See Article XXIII (*h*) (Malloy's Treaties, II, 2285). See also in this connection opinion of Lord Reading in Porter *v*, Freudenberg ([1915] 1 K. B. 857, 876–880); A. P. Higgins (Hague Peace Conferences, 263–265).

[3] See Malloy's Treaties, II, 2289. "The words 'for the benefit of the State' were inserted in the article to exclude local dues collected by local authorities. The occupant will supervise the expenditure of such revenue and prevent its hostile use." (Rules of Land Warfare, No. 311, citing Holland, Laws of War on Land, par. 108; Spaight, War Rights on Land, p. 378.)

"The first charge upon the State taxes is for the cost of local maintenance. The balance may be used for the purposes of the occupant." (Rules of Land Warfare, No. 310.)

See documents in Moore, Dig. VII, 282–285, concerning the experience of the United States in the course of the occupation by its forces of Mexican territory, 1846–1848; also Justin H. Smith, "American Rule in Mexico" (Am. Hist. Rev. XXIII, 287).

[4] See Rules of Land Warfare, No. 309. See also Edmonds and Oppenheim, Land Warfare, No. 371.

[5] See No. 308, which is based on Edmonds and Oppenheim, Land Warfare, No. 372.

See Justin H. Smith, "American Rule in Mexico" (Am. Hist. Rev. XXIII, 287, 292, 293), and documents there cited.

that if in addition to the taxes mentioned in the previous article the occupant levies other money contributions in the occupied territory, it shall be only for the needs of the army or for the administration of the territory.[1]

Doubtless the occupant may lay duties on imports, and thereby obtain a convenient source of revenue otherwise difficult to collect. American military occupants have resorted to such procedure.[2]

(*b*)

CONTRIBUTIONS.

By a method other than the imposition of taxes or the collection of customs duties, a belligerent occupant may in fact proceed to increase his revenues from the territory under his control. He may levy contributions. Contributions have been defined as "such payments in money as exceed the produce of the taxes." [3] The design of the occupant in levying contributions may be primarily to defray expenses of administration, or to inflict punishment collectively upon a community on account of the commission of an offense for which it is held responsible, or merely to enrich the invader. Because of the helplessness of those from whom the funds are exacted, as well as the possible hostility and greed of the occupant, this procedure is capable of easy abuse. The difficulty of restraining an unscrupulous belligerent from yielding to motives of revenge or cupidity is a real one, especially when the territory occupied is inhabited by a population whose conduct affords pretext for the excesses of the invader. For that reason there is needed close observation of, and general agreement respecting, the limitations which the principles of justice clearly demand.

It does not appear to be unreasonable for an occupant to levy contributions to defray any necessary expense confronting him,

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[1] See Malloy's Treaties, II, 2289.

See Official Communication on the Economic Exploitation of Servia, issued by the Servian minister at Washington, Aug. 28, 1917.

[2] "Upon the occupation of the country by the military forces of the United States the authority of the Spanish Government was superseded, but the necessity for a revenue did not cease. The Government must be carried on, and there was no one left to administer its functions but the military forces of the United States. Money is requisite for that purpose, and money could only be raised by order of the military commander. The most natural method was by the continuation of existing duties. In adopting this method, Gen. Miles was fully justified by the laws of war." (Brown, J., in the course of the opinion of the court, in Dooley *v.* United States (182 U. S. 222, 230).)

See also President Polk, special message, Feb. 10, 1848 (Richardson's Messages, IV, 571; Moore, Dig. VII, 269); Cross *v.* Harrison (16 How., 164, 190); New Orleans *v.* Steamship Co. (20 Wall., 387, 394).

See also President McKinley, Executive order, July 12, 1898, respecting the tariff of duties and taxes to be levied upon the occupation and possession of any ports and places in the Philippine Islands by American forces (Magoon's Reports, 217).

"It would therefore seem that the payment of customs duties, if considered as taxes levied by a Government resulting from military occupation of hostile territory, or as military contributions required from hostile territory, or as a condition imposed upon the right of trade with hostile territory, are each and all legitimate and lawful requirements imposed by exercise of belligerent right." (Magoon's Reports, 227.)

[3] See Hall, 6 ed., 421.

whether for the needs of his army or for the administration of the territory.[1] The Hague regulations of 1907, acknowledge the lawfulness of such action,[2] and specify certain procedure to be followed in the collection of funds.[3] They imply, however, that a contribution is not to be levied for the purpose of enriching the invader. It is believed that this implication should take the form of definite prohibition. There is needed a general understanding expressed in definite form and declaring with precision what kinds of contribution are to be deemed in legal contemplation as enriching the occupant rather than as merely supporting his army or defraying costs of administration.[4] Thus he ought not to be permitted to excuse by charging to either of such accounts, contributions levied for the purpose of enabling him to minimize generally the financial burdens of his sovereign occasioned by the war, and still less to meet the expense of operations undertaken outside of the occupied district. No requirements attributable to military necessity, however, acutely felt by an impoverished belligerent, should be allowed to justify defiance of this principle.[5] In proof of his good faith, the occupant should be obliged at the close of the war to make a reasonable accounting for sums acquired by contribution, and purporting to have been raised for purposes acknowledged to be lawful.

The Hague regulations of 1907, declare that "no general penalty, pecuniary or otherwise, shall be inflicted upon the population on

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[1] "No principle is better established than that a nation at war has the right of shifting the burden off itself and imposing it on the enemy by exacting military contributions. The mode of making such exactions must be left to the discretion of the conqueror, but it should be exercised in a manner conformable to the rules of civilized warfare.

"The right to levy these contributions is essential to the successful prosecution of war in an enemy's country, and the practice of nations has been in accordance with this principle. It is as clearly necessary as the right to fight battles, and its exercise is often essential to the subsistence of the army." (President Polk, a special message, Feb. 10, 1848, Richardson's Messages, IV, 571; Moore, Dig. VII, 285.)

[2] See Article XLIX, which declares that if contributions are levied, "this shall only be for the needs of the army or of the administration of the territory in question." (Malloy's Treaties, II, 2289.)

Holland declares with reason that "It may sometimes be justifiable to levy a money contribution on one place, in order to spend it on the purchase of requisitions in kind at another place. The burden of the war may thus be more equitably distributed, falling on the inhabitants generally, rather than upon individual owners of the property which may be required." (War on Land, 55.)

[3] According to Article LI, "No contribution shall be collected except under a written order, and on the responsibility of a commander-in-chief.

"The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.

"For every contribution a receipt shall be given to the contributors." (Malloy's Treaties, II, 2289).

It may be observed that Article LIII acknowledges the right of the occupant to "take possession of cash, funds, and realizable securities which are strictly the property of the State." (Id.) This taking possession is an act differing sharply in character from the levying of taxes or contributions. In the former case the occupant merely avails himself of the privilege of subjecting to control public funds already collected and at the disposal of the de jure sovereign when it was deprived of its power.

[4] Declares Holland: "The occupant is not to levy contributions for the mere purpose of enriching himself." (War on Land, 55.) See also in Edmonds and Oppenheim, Land Warfare, No. 423.

[5] Even the German War Book (*Kriegsbrauch im Landkriege*) declares that "the conqueror is, in particular, not justified in recouping himself for the cost of the war by inroads upon the property of private persons, even though the war was forced upon him." (Translation by J. H. Morgan, 135.) This statement is cited in a note in Edmonds and Oppenheim, Land Warfare, appended to No. 424.

account of the acts of individuals for which they can not be regard as jointly and severally responsible."[1] It is here implied that coll tive punishments may be inflicted for such offenses as the communi has committed or has permitted to be committed. The Rules Land Warfare announce that such offenses are not necessarily limit to violations of the laws of war, and declare that any breach of t occupant's proclamations or martial-law regulations may be punish collectively. Thus, it is said that a town or village may be held c lectively responsible for damage done to railways, telegraphs, roa and bridges in the vicinity, and that the most frequent form of c lective punishment consists in fines.[2] It may be observed that t levying of collective contributions of a penal nature, however eff tive as a deterrent of acts jeopardizing the safety of the invader, i weapon which an unscrupulous occupant may be quick to seize fo lawless purpose, and to employ without restraint. As yet there is accepted or uniform method of determining under what circu stances the act of the individual is to be regarded as one for the co mission of which a community should be deemed collectively respo sible. If responsibility may be imposed at the will of a command regardless of the evidence or without a hearing, his caprice or ang may beget robbery, and fines may be exacted in mockery of justic Events of the European War, and notably the German occupation Belgium, have afforded convincing proof that no rule of law mere acknowledging the right of a military officer to apply repressi fiscal measures against a helpless population under his control suffic to check wanton abuse of power.[3] There must be restraint for t intemperate and unscrupulous commander. To hold in check suc an officer, as well as, or rather than, one incapable of yielding to exce appropriate rules of procedure need to be laid down and accepted These, it is believed, should indicate some judicial process designe to permit the presentation of defensive testimony. Reasonab opportunity for its presentation should be made a condition prec dent to the validity of any collective fine. Moreover, the belligere levying it, should be compelled at the close of the war to exhibit its former adversary, on demand, a record of the proceedings embra ing all of the evidence presented.

[1] See Article L (Malloy's Treaties, II, 2289); also Rules of Land Warfare, No. 353.

[2] See No. 354.

[3] See Jean Massart, vice director of the class of sciences in the Royal Academy of Belgium (Belgia Under the German Eagle, London, 1916, 143–150, 156–158).

See also notice of the German commander in chief, Sept. 3, 1914, imposing a fine on Luneville (Germ Atrocities in France (translation of Official Report of the French Commission), 18; Stowell and Munr International Cases, 161.

See J. W. Garner, "Community Fines and Collective Responsibility" (Am. Journal, XI, 511).

[4] The same need is apparent with respect to the imposition of collective punishments where the penal inflicted is other than pecuniary.

(c)

REQUISITIONS.

It is accepted doctrine that a belligerent occupant may not unlawfully requisition whatever is necessary for the maintainance of his army, whether of direct military use, or of indirect use, such as fuel and food supplies, clothing, wine, tobacco, printing presses, type, leather, cloth, etc.[1] Article LII of The Hague regulations of 1907, acknowledging this right, applies certain limitations in its exercise. Thus it is declared that requisitions in kind and services are not to be demanded from municipalities or inhabitants "except for the needs of the army of occupation."[2] Such requisitions must, moreover, "be in proportion to the resources of the country." Requisitions and services are only to be demanded on the authority of the commander in the locality occupied. It is provided that contributions in kind shall as far as possible be paid for in cash; and, if not, that a receipt be given and payment of the amount due be made as soon as possible. The Rules of Land Warfare of the United States, declare that if practicable, requisitions should be accomplished through the local authorities by systematic collection in bulk, and that they may be made "direct by detachments if local authorities fail for any reason." It is added that billeting may be resorted to if deemed advisable.[3]

"The needs of the army" for which the occupant is authorized to provide are not identical with the general requirements of the belligerent to whose service he is attached. The latter are not to be supplied from stores within the occupied district. Thus the removal of food supplies therefrom for the maintenance of other forces or populations in foreign places, appears by implication to be contrary to the Hague Regulations and should be expressly forbidden.[4]

Doubtless it rests with the occupant to fix the prices of articles requisitioned and paid for.[5] The expediency of cash payment when

[1] See Rules of Land Warfare No. 346 and notes accompanying it.

[2] See Malloy's Treaties, II, 2289.

See also in this connection, G. Ferrand, *Des Réquisitions* (Paris, 1917), 209-219; 427-429.

[3] See Rules of Land Warfare, No. 347. Attention is here called to the fact that the method of requisitioning "differs from the rule as to contributions, which requires the order of the commander in chief."

According to note 2 attached to the foregoing rule: "It is generally recognized by all States that the assistance of local authorities is advisable, since in addition to the avoidance of contact with troops and inhabitants, the more even distribution of supplies furnished by the inhabitants is secured. The direct method was resorted to in the Civil War, and especially by Gen. Sherman, because 'the country was sparsely settled, with no magistrates or civil authorities, who could respond to requisitions, as is done in all years in Europe; so that this system of foraging was indispensable to our success.' Memoirs, Vol. II, p. 183."

[4] See Rules of Land Warfare, No. 348.

[5] The right to fix the prices of articles requisitioned would not appear to give the occupant the right also to place an artificial valuation on the currency of his country circulated in the occupied territory. According to a German proclamation posted at Liége, Aug. 25, 1914, the value of a mark was fixed at 130 centimes, and announcement was made that all German paper money should be accepted in financial transactions at the same rate as German coin. This action is criticised in Jean Massart (Belgians Under the German Eagle, 155), on the ground that an intentional fraud was committed by fixing an artificial and excessive valuation.

possible, and of taking up receipts as soon as possible is apparent.[1] Coercive measures may be necessary to enable the occupant to obtain articles requisitioned, especially when cash is not paid. The measures adopted ought to be limited, as the Rules of Land Warfare acknowledge, to the amount and kind necessary to attain the end in view.[2] At present there is no agreement as to the nature or extent of coercive measures. It is believed that there is need of a general understanding respecting the establishment of appropriate means to check abuses of power on the part of the occupant when the inhabitants of the district prove to be reluctant or unwilling to furnish articles requisitioned.

(*d*)

SPECIAL RESTRICTIONS IN RELATION TO PRIVATE PROPERTY.

A belligerent occupant by reason of his very achievement in having gained the mastery over the district under his control, finds himself in a somewhat different relation to property within his grasp than does the commander of an army in the field. The common demands of the latter chargeable to military necessity and for the purpose of protecting a force against attack, or to enable it to engage in offensive operations, are not likely to be felt to the same degree by the invader who has once established himself in hostile territory. He has much less frequent occasion to resort to the destruction of enemy property.[3] Nor is he likely to have just grounds for its devastation.[4]

During the Civil War the practice of the United States indicated no sharp line of distinction between the rights of a belligerent occupant and those of an army operating in the field in hostile territory. Nor was there such a distinction laid down in the cases arising

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[1] See Rules of Land Warfare, No. 349.

See protest communicated by the Belgian Legation at Washington to Department of State, June 30, 1915, against the requisitions of goods by the German authorities in Belgium.

See also German Treatment of Conquered Territory (Red, White, and Blue Series, No. 8, March, 1918, issued by Committee on Public Information, and edited by Dana C. Munro, George C. Sellery, and August C. Krey).

[2] See Rules of Land Warfare, No. 350.

[3] It may be observed that the provisions of The Hague regulations relative to the destruction and seizure of enemy property are contained in an article (XXIII) prior to and outside of the section (Arts. XLII–LVI) devoted to "Military Authority Over the Territory of the Hostile State."

The Rules of Land Warfare embrace in a single chapter (IX) all of the provisions respecting the "Treatment of Enemy Property." The arrangement follows in this respect that observed by Edmonds and Oppenheim in their exposition of The Laws and Usages of War on Land for the Guidance of British Officers.

See Belligerent Measures and Instrumentalities, Seizure, Destruction, and Devastation of Enemy Property, infra.

See Case of William Hardman, American and British Claims Commission, June 18, 1913 (Am. Journal, VII, 879; Stowell and Munro's International Cases, II, 536).

[4] Thus No. 334 of the Rules of Land Warfare states that in order to justify devastation, "there must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army." It must be obvious that the military problem furnishing such a connection is not likely to confront the belligerent occupant.

But see P. Fauchille, "*Les Allemands en territoire occupé*" (February-March, 1917), *Rev. Gén.*, XXIV, 316.

from seizures made by Union forces during that conflict. While utterances of the Supreme Court of the United States appeared to acknowledge a broad right of seizure if dictated by necessary operations of war, and to deny generally the propriety of "the seizure of the private property of pacific persons for the sake of gain,"[1] it was frequently declared that private property specially beneficial to the Confederacy as a basis of securing credit, such as cotton, was subject to seizure and confiscation.[2] The courts were also necessarily bound by such acts of Congress as were applicable. These were based partly upon the theory that the conflict was an insurrection against the lawful Government of the United States, and that property belonging to persons giving aid or comfort to the rebellion, or used in aid of it, was justly subject to seizure and confiscation.[3] It may be doubted whether the decisions interpreting the acts of Congress serve as useful precedents respecting the extent of the rights of a belligerent occupant under the law of nations.[4]

The Hague regulations announce that private property "must be respected."[5] This restriction, as interpreted by the Rules of Land Warfare, does not interfere with the right of the occupant to resort to taxation, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, boats or ships, lands, and churches, for temporary and military use.[6] None of these acts constitute, however, confiscation. The Hague regulations declare that private property can not be confiscated.[7] This prohibition implies that unless

[1] See opinion of Chief Justice Chase in behalf of the court, in Mrs. Alexander's Cotton (2 Wall. 404, 419), quoting 1 Kent, 93; also Briggs *v.* United States (143 U. S. 346, 358).

[2] See Mrs. Alexander's Cotton (2 Wall. 404, 419); Lamar *v.* Browne (92 U. S. 187); Young *v.* United States (97 U. S. 39, 59–61).

See also Mr. Seward, Secretary of State, to Mr. Adams, minister to England, Apr. 10, 1863 (Dip. Cor. 1863, I, 210, 211; Moore, Dig. VII, 303); Mr. Bayard, Secretary of State, to Mr. de Muruaga, Spanish Minister, June 28, 1886 (For. Rel. 1887, 1006; Moore, Dig. VII, 303); same to same, Dec. 3, 1886 (For. Rel. 1887, 1015; Moore, Dig. VII, 304).

[3] See Act of Aug. 6, 1861, "to confiscate property used for insurrectionary purposes" (12 Stat. at L. 319); Act of July 17, 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes" (12 Stat. at L. 589); Act of Mar. 12, 1863, "to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States" (12 Stat. at L. 820).

See also letter of Mr. Shaw, Secretary of Treasury, to Chief Justice Nott, of the Court of Claims, Feb. 18, 1902 (Moore, Dig. VII, 298).

Concerning the sequestration act of the Confederate States, 1861, see Parl. Papers, Correspondence Relative to the Civil War in the United States of North America, North America, No. 1 [1862], 108–109, Stowell and Munro's International Cases, II, 133.

[4] See cases in Moore, Dig. VII, 290–292.

[5] See Article XLVI (Malloy's Treaties, II, 2289).

[6] See No. 335, citing Gen. Orders, No. 100, Apr. 24, 1863, Art. XXXVII, par. 2.

[7] See Article XLVI (Malloy's Treaties, II, 2289).

According to Article XLVII, "Pillage is formally forbidden." "Pillage, as an untechnical term, means indiscriminate plundering, such as under the old rule of *courir sus* was habitually practised against the enemy. As a term of modern law it may be defined as the unauthorised taking away of property, public or private." (Westlake, 2 ed., II, 103.)

In the order of President McKinley to the Secretary of War, July 18, 1898, on the occupation of Santiago de Cuba by the American forces, it was stated that "Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause." (Correspondence Relating to War with Spain, I, 159; Moore, Dig. VII, 261, 263.)

seized by lawful process as a penalty for wrongful conduct, such property is not to be taken from the owner without compensation. It does not restrict the occupant from dealing with private property in a particular way, if he is confronted with a necessity occasioned by his actual and immediate requirements;[1] but it gives the owner hope of reimbursement for the loss he sustains in being deprived of his property.[2] In applying this principle The Hague regulations make wise provision that all appliances, whether on land, at sea, or in the air, adapted for the transmission of news or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.[3]

It is believed that no distinction should be made between tangible and intangible or incorporeal private property, such as debts due to the inhabitants of the occupied district, with respect to the duty of the belligerent to refrain from confiscation. Where the State of the occupant is itself the debtor, the reason for restraint is like that apparent when, for any reason, the debt is regarded as being within the territory of the belligerent, and subject to its jurisdiction. If the debtor is a private individual residing in that territory, and the creditor an inhabitant of the occupied district, no reason is apparent why the occupant should be entitled to cancel the debt.

(*e*)

CERTAIN PROVISIONS RESPECTING PUBLIC PROPERTY.

(i)

Movable property.

The Hague regulations acknowledge yet limit the right of the occupant to take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belong-

[1] See Rules of Land Warfare, No. 340, in which it is said that "Private property can be seized only by way of military necessity for the support or other benefit of the Army or of the occupant."

[2] See Georges Ferrand (*Des Réquisitions en matière de Droit International Public*, Paris, 1917, 209–219). See also Manual of the Institute of International Law on the Laws of War on Land (1880, Art. LX); *Annuaire* (V, 170); J. B. Scott (Resolutions, 38).

[3] See Article LIII (Malloy's Treaties, II, 2290).

According to Rules of Land Warfare, No. 342, "The foregoing rule includes everything susceptible of direct military use, such as cables, telephone and telegraph plants, horses and other draft and riding animals, motors, bicycles, motorcycles, carts, wagons, carriages, railways, railway plants, tramways, ships in port, all manner of craft in canals and rivers, balloons, airships, aeroplanes, depots of arms, whether military or sporting, and in general all kinds of war material." (Citing Edmonds and Oppenheim, Land Warfare, No. 415.)

ing to the State which may be used for military operations.[1] The Rules of Land Warfare advert to the fact that while all movable property belonging to the State, and which is directly susceptible of military use, may be taken possession of "as booty and utilized for the benefit of the invader's Government," other movable property, not directly susceptible of such use, "must be respected and can not be appropriated." [2] It is declared that where the ownership of property is unknown—that is, where there is any doubt as to whether it is public or private, as frequently happens—it should be treated as public property until ownership is definitely settled.[3]

(ii)

Immovable property.

The occupant is not deemed to possess "the absolute right of disposal or sale" of immovable property belonging to the hostile State.[4] He is regarded as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to it and within its domain. The Hague regulations of 1907 declare that he must safeguard the capital of such properties and administer them in accordance with the rules of usufruct.[5] Thus he should not exercise his rights in such wasteful and negligent manner as to impair the value of the property enjoyed. The Rules of Land Warfare state that he may lease or utilize public lands or buildings, sell the crops, cut and sell timber, and work the mines.[6] It is declared, however, that real property of a State, which is of direct military use, such as forts, arsenals, dockyards, magazines, barracks, railways, canals, bridges, piers, and wharves, remain in the hands of the occupant until the close of the war, and may be destroyed or damaged, if deemed necessary, in military operations.[7] It may be observed that public immovable property possessing normally a civil rather than a military character, such as buildings devoted to philanthropic uses, may under certain conditions become of direct military value; and when it does, it appears to be subject to such

[1] See Article LIII (Malloy's Treaties, II, 2289); also Rules of Land Warfare, No. 360.

See Magoon's Reports, 261, in re order of Maj. Gen. Otis requiring a banking house at Manila to turn over to the American authorities $100,000, held as the property of the insurgent forces in the Philippines; also Moore, Dig. VII, 278.

[2] See No. 361, where it is said that "It is usual to accord protection to Crown pictures, jewels, collections of art, and archives, but papers connected with the war may be secured, even if they pertain to archives." (Citing Edmonds and Oppenheim, Land Warfare, No. 431.)

[3] See Rules of Land Warfare, No. 362.

[4] See Rules of Land Warfare, No. 356.

[5] See Article LV (Malloy's Treaties, II, 2290).

[6] See Rules of Land Warfare, No. 356, where it is also said that "a lease or contract should not extend beyond the conclusion of the war." See, in this connection, New Orleans *v.* Steamship Co. (20 Wall. 387); opinion of Mr. Knox, Attorney General, Oct. 17, 1901 (23 Op. 551, 561).

[7] See Rules of Land Warfare, No. 357.

treatment as the occupant may find necessary to apply to any other property susceptible of direct military use.

The property of municipalities and that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property must be treated, according to The Hague regulations of 1907, as private property. It is declared that all seizure of, destruction or willful damage done to, institutions of this character, historic monuments, works of art or science, is forbidden and should be the subject of legal proceedings.[1] Doubtless the property included within this rule may be utilized in case of necessity, as the Rules of Land Warfare indicate, for quartering troops, the sick and wounded, horses, stores, etc. Such property must, however, it is said, be secured against all avoidable injury, even when located in fortified places which are subject to seizure or bombardment.[2]

(3)

MEASURES RELATING TO THE PERSONS OF THE INHABITANTS.

In exercising the right to demand and enforce from the inhabitants of the hostile territory such obedience as may be necessary for the security of his forces and for the maintenance of law and order, as well as for the proper administration of the country, the occupant possesses large discretion.[3] His rights are not, however, commensurate with his power. He is thus forbidden to take certain measures which he may be able to apply, and that irrespective of their efficacy. The restrictions imposed upon him are in theory designed to protect the individual in the enjoyment of certain fundamental rights. These concern his allegiance to the de jure sovereign, his family honor and domestic relations, religious convictions, personal service, and connection with or residence in the occupied territory.

The Hague regulations declare that the occupant is forbidden to compel the inhabitants to swear allegiance to the hostile power, that is, to the Government of the occupant.[4] It is believed that notwithstanding this requirement, the occupant may not unreasonably compel the inhabitants, in case of persistent and insidious attempts to resist his authority, to take oath not to oppose the lawful assertion of the same, and so facilitate his task of enforcing them to respect their legal duty of obedience.[5]

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[1] See Article LVI (Malloy's Treaties, II, 2290).

[2] See Rules of Land Warfare, No. 359; also Gen. Orders, No. 100, Apr. 24, 1863, Art. XXXV. See also Edmonds and Oppenheim, Land Warfare, No. 429.

[3] See Rules of Land Warfare, No. 312. See also Edmonds and Oppenheim, Land Warfare, Nos. 355 and 382.

[4] See Article XLV (Malloy's Treaties, II, 2288).

[5] The fact needs to be emphasized that to resist the assertion of authority by the occupant is essentially unlawful. In compelling the inhabitants to give assurance, as by an appropriate oath, that they will desist from acts of resistance, the occupant is merely requiring a pledge of obedience to the law, and one

Clearly the occupant may punish severely persons guilty of what is known as war treason. According to the Rules of Land Warfare some of the principal acts punished as treasonable by belligerents in invaded territory, when committed by the inhabitants, are espionage, supplying information to the enemy, damage to railways, war material, telegraphs, or other means of communication; aiding prisoners of war to escape; conspiracy against the armed forces of the enemy or members thereof; intentional misleading of troops while acting as guides; voluntary assistance to the enemy by giving money or serving as guides; inducing soldiers to serve as spies, to desert, or to surrender; bribing soldiers in the interest of the enemy; damage or alteration to military notices and signposts in the interests of the enemy; fouling sources of water supply and concealing animals, vehicles, supplies, and fuel in the interest of the enemy; knowingly aiding the advance or retirement of the enemy; circulating proclamations in the interests of the enemy.[1]

The Hague regulations of 1907 declare that family honor and rights, the lives of persons, as well as religious convictions and practice, must be respected.[2] An occupant in applying penalties for resistance to his authority is not restrained by this rule from the taking of human life according to lawful process.[3] On the other hand, there are limitations respecting the forms of penalties which the occupant ought to be obliged to regard. Again, in his general course of administration, when no question as to a penalty is at issue, he should be bound on principle to respect scrupulously certain rights of the individual. The Hague regulations furnish insufficient guidance. In the Instructions for the Government of Armies of the United States in the Field, of 1863, it is said that the United States acknowledges and protects, in hostile countries occupied by its forces, "religion and morality; the persons of the inhabitants, especially those of women, and the sacredness of domestic relations."

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which is wholly unrelated to and consistent with the allegiance of the pledgors to their own sovereign. Such procedure resembles in principle that of compelling an individual by judicial process to give a bond to keep the peace. As such a bond is only exacted from one who by his sinister conduct has given proof of the danger to the State, or some individuals within its territory, of his being at large, so in the case of an occupied district, the reasonableness of calling upon the inhabitants to make oath not to resist the occupant would appear to depend upon proof of a disposition and attempt on their part lawlessly to oppose his authority.

See Spaight (War Rights on Land, 372, cited in Rules of Land Warfare, No. 313), relative of the practice of both belligerents in the Boer War of exacting oaths of neutrality; also Holland (Laws of War on Land, 53).

Compare L. Oppenheim, "The Legal Relations Between an Occupying Power And The Inhabitants" (L. Q. Rev. XXXIII, 363).

[1] The language of the text is that contained in Rules of Land Warfare, No. 372, citing Edmonds and Oppenheim (Land Warfare, par. 445).

[2] See Article XLVI (Malloy's Treaties, II, 2289)

[3] See in this connection Westlake, 2 ed. II, 103

Offenses to the contrary are declared to be vigorously punished.[1] It is believed that under no circumstances, whether or not as an incident of a penalty for lawless conduct, should the occupant be permitted to violate the requirements of morality or to ignore the sacredness of domestic relations. No belligerent occupant under the American flag will ever be disposed to disregard these requirements. Nevertheless, events of the European War have grimly brought home to enlightened States the necessity of enunciating prohibitions more explicit than are contained in The Hague regulations, and that also of causing by some process a belligerent to impose definite restraint upon its forces occupying hostile territory.

The clear duty to respect family honor and rights seems to deny the occupant any right, save as incidental to the imposition of a penalty reasonably applied, to break up families by causing the separation of their members. Thus the deportation of individuals, through the disruption of family ties, apart from other objections, marks contempt for an obligation which the occupant owes to the unoffending inhabitants within the district under his control.[2]

Doubtless a belligerent occupant possesses a broad right to utilize the services of the inhabitants. He is restricted, however, with respect both to the kind of service exacted and the purpose for which it is sought. The Hague regulations of 1907 declare that services shall not be demanded from inhabitants except for the needs of the army of occupation, and that they shall be of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.[3] The two limitations thus laid down are important. By restricting the service to one responsive to the needs of the army of occupation there is forbidden, by implication, any requisition of services to be performed outside of the occupied district. Thus the occupant is on principle forbidden to deport the inhabitants to his own country for any work therein.

[1] See Gen. Orders, No. 100, Apr. 24, 1863, §XXXVII. This is reproduced in Rules of Land Warfare, No. 315. See also instructions to Gen. Merritt, May 28, 1898, quoted in note 1 appended thereto.

"It is my desire that the inhabitants of Cuba should be acquainted with the purpose of the United States to discharge to the fullest extent its obligations in this regard. It will therefore be the duty of the commander of the army of occupation to announce and proclaim in the most public manner that we come not to make war upon the inhabitants of Cuba, nor upon any party or faction among them, but to protect them in their homes, in their employments, and in their personal and religious rights." (President McKinley, order to the Secretary of War, July 18, 1898, on the occupation of Santiago de Cuba by the American forces, Correspondence Relating to the War with Spain, I, 159; Moore, Dig. VII, 261.)

It is declared in Rules of Land Warfare, No. 316, that "in return for such considerate treatment it is the duty of the inhabitants to carry on their ordinary peaceful pursuits, to behave in an absolutely peaceful manner, to take no part whatever in the hostilities carried on, to refrain from all injurious acts toward the troops or in respect to their operations, and to render strict obedience to the officials of the occupant."

[2] See The Deportation of Women and Girls from Lille (translated textually from the note addressed by the French Government to the Governments of neutral powers on the conduct of German authorities towards the population of the French departments in the occupation of the enemy), New York, 1917.

[3] See Article LII (Malloy's Treaties, II, 2289), where it is also said that such services shall only be demanded on the authority of the commander in the locality occupied. See Rules of Land Warfare, No. 317.

See communication of Belgian Legation to Department of State, Sept. 22, 1915, respecting the treatment of Belgian workmen by German authorities at Luttre (Stowell and Munro's International Cases, II, 153).

His sovereign can not, therefore, justly have recourse to such procedure for the purpose, for example, of releasing from industrial pursuits nationals or others engaged therein who are needed for military service. The occupant may not lawfully deport the male population of the district under his sway in order to increase proportionally the general fighting forces of his own country. Nor does the circumstance that the inhabitants of the district may be more easily maintained and fed at less sacrifice or inconvenience to the Government of the occupant within territory other than that where they dwell, afford solid excuse for their deportation.[1]

Within the limits above prescribed the occupant may demand services within a wide field and for a variety of purposes.[2] Thus he may reasonably requisition labor to restore the general condition of the public works of the country to that of peace; that is, to repair roads, bridges, railways, as well as to bury the dead and collect the wounded. In short, under the rules of obedience, they may be called upon to perform such work as may be necessary for the ordinary purposes of government, including police and sanitary work.[3] The prohibition against forcing the inhabitants to take part in the operations of war against their own country precludes, however, according to the Rules of Land Warfare, the requisitioning of their services upon works directly promoting the ends of war, such as the construction of forts, fortifications, and entrenchments; but there

[1] See Fernand Passelecq, *Les Déportations Belges a La Lumière Des Documents Allemands* (Paris, 1917); Jules Destree, The Deportations of Belgian Workmen (London, 1917); The Deportations, a statement by Mr. Brand Whitlock, American minister to Belgium (London, 1917); J. Van den Heuvel, "*De la déportation des Belges en Allemagne*". (*Rev. Gén.*, XXIV, 261); The Times (Hist. and Encyc. of the War, part 156, Vol. XII, Aug. 14, 1917, "Belgium Under German Rule: The Deportations"); communication of Cardinal Mercier, archbishop of Malines, to the German governor general of Belgium, Nov. 10, 1916 (Official Bulletin, Dec. 22, 1917, No. 191, p. 11).

Declared Mr. Lansing, Secretary of State, in a communication to Mr. Grew, American chargé d'affaires at Berlin, Nov. 29, 1916: "The Government of the United States has learned with the greatest concern and regret of the policy of the German Government to deport from Belgium a portion of the civilian population for the purpose of forcing them to labor in Germany, and is constrained to protest in a friendly spirit but most solemnly against this action, which is in contravention of all precedent and of those humane principles of international practice which have long been accepted and followed by civilized nations in their treatment of noncombatants in conquered territory. Furthermore, the Government of the United States is convinced that the effect of this policy, if pursued, will in all probability be fatal to the Belgian relief work so humanely planned and so successfully carried out, a result which would be generally deplored and which, it is assumed, would seriously embarrass the German Government." (American White Book, European War, IV 358.) See also documents id. 357–373.

See also memorandum of the Belgian Government on the Deportation of Forced Labour of the Belgian Civil Population Ordered by the German Government, Feb. 1, 1917; Arnold J. Toynbee, The Belgian Deportations (with a statement by Viscount Bryce), London, 1917.

[2] The services which may be requisitioned include, according to the Rules of Land Warfare, those of "professional men and tradesmen, such as surgeons, carpenters, butchers, bakers, etc., employees of gas, electric light, and water works, and of other public utilities, and of sanitary boards in connection with their ordinary vocations. The officials and employees of railways, canals, river or coastwise steamship companies, telegraph, telephone, postal, and similar services, and drivers of transport, whether employed by the State or private companies, may be requisitioned to perform their professional duties so long as the duties required do not directly concern the operations of war against their own country." (No. 318.)

[3] See Rules of Land Warfare, No. 319.

is said to be no objection to their being employed voluntarily, for pay, on such class of work, except the military reason of preventing information concerning it from falling into the hands of the enemy.[1]

The Hague regulations of 1907 forbid the occupant to force the inhabitants of the territory occupied to furnish information about the army of the other belligerent, or about the means of defense.[2] It is acknowledged in the United States that the impressment of guides is forbidden under this rule.[3] While this requirement may restrict the successes of an army in the field, the rule imposes a much less burdensome restraint upon the occupant because of the essential nature of his task. He may not be confronted with an absolute need of information obtainable solely from guides to be found among the inhabitants of the country.[4]

The taking of hostages has been a procedure which in recent wars a belligerent occupant as well as an army in the field has utilized. The Hague regulations of 1907, are silent as to the practice.[5] The Rules of Land Warfare advert to the fact that hostages have been taken to protect lines of communication "by placing them on engines of trains in occupied territory," and also to insure compliance with requisitions and contributions.[6] Nor is it there suggested that the practice is reprehensible. While the taking of hostages by the occupant may under certain circumstances operate as a reasonable mode of securing compliance by a restive population with a just demand designed to promote the maintenance of order, occurrences of the European war encourage the belief that it is also a weapon likely to be employed by a despot to check interference of any sort with ruthless and cruel acts inspired by caprice.[7] It is believed, therefore, that by general agreement, a belligerent occupant should either be forbidden to resort to the practice, or that his sovereign should be compelled at the close of the war to exhibit proof to its former enemy, of the necessity which impelled its representative to resort to such measures, and of the manner in which they were carried out. In any event, so long as the right of the occupant to take hostages is acknowledged, it seems reasonable to demand that a belligerent be obliged to caution its commanding officers in hostile territory, in a definite manner and with precise directions as to the circumstances when hostages should be taken, and respecting the treatment to be accorded them while held as such.

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[1] See No. 320.
See "*Du travail en vue des opérations de guerre imposé par l'Allemagne aux habitants en pays d'occupation*," (Clunet, XLV, 123).

[2] See Article XLIV (Malloy's Treaties, II, 2288).

[3] See Rules of Land Warfare, Nos. 322 and 323. See in this connection Holland (Laws of War on Land, 53); Westlake (2 ed. II, 101); A. P. Higgins (Hague Peace Conferences, 268, 269).

[4] See J. M. Spaight (War Rights On Land, 368–371).

[5] See Edmonds and Oppenheim, Land Warfare, Nos. 461–464.

[6] See No. 387.

[7] See also C. Phillipson's Wheaton (519–545); Baty and Morgan (War: Its Conduct and Legal Results, 185–187).

(4)

MISCELLANEOUS MEASURES—NEUTRAL CONSULS.

The belligerent occupant possesses an unquestioned right to regulate all intercourse between the territory under his control and the outside world.[1] He may exclude commerce wholly from occupied ports, or permit it under such conditions as he may prescribe.[2] He may establish a censorship over various forms of publication and communication, and may himself take charge of agencies for the transmission of intelligence.[3] He may exercise full authority over all means of transportation.[4] He may determine the extent and kind of relief offered from abroad for the sustenance of the civil population, and may regulate the distribution of foodstuffs.[5]

The belligerent occupant is entitled to control the exercise of neutral consular functions within the district. Thus the German Government, in consequence of the occupation by its forces of certain portions of Belgium, announced in November, 1914, that the exequaturs of neutral consular officers formerly permitted to act therein were regarded as having expired.[6] It was said that while the issuance of new exequaturs under imperial authority was deemed inadvisable, there would be granted to consular officers whose names were communicated to the foreign office, temporary recognition to enable them to act in their official capacity, under reserve of the usual investigations respecting their records. Acknowledging that such officers were commercial and not political representatives of a Government, and that permission for them to act within defined districts was dependent upon the authority actually in control thereof "irrespective of the question of legal right," the Department of State responded that it was not at the time inclined to question the right of the Imperial Government to suspend the exequaturs of American consuls within the districts occupied by the military forces of the

[1] See Rules of Land Warfare, No. 304. See also Magoon's Reports, 210, 227.

[2] See President Polk, special message, Feb. 10, 1848 (Richardson's Messages, IV, 571; Moore, Dig. VII, 269); Mr. Adee, Acting Secretary of State, to Count Quadt, German chargé d'affaires, No. 481, Oct. 19, 1900 (MS. Notes to German Legation, XII, 500; Moore, Dig. VII, 272); Magoon's Reports, 302, respecting the case of the British vessel *Will O' The Wisp;* Magoon's Reports, 316, in re complaint of the German ambassador at Washington, July 31, 1900, respecting restrictions of trade with the inhabitants of the Sulu Islands, imposed by the military government of the Philippine Archipelago.

[3] See Rules of Land Warfare, No. 305; also Edmonds and Oppenheim, Land Warfare, Nos. 374 and 375.

According to Article LIV of The Hague regulations of 1907, submarine cables connecting an occupied territory with a neutral territory are not to be seized or destroyed except in the case of absolute necessity. It is declared that they must likewise be restored and compensation fixed when peace is made.

[4] See Rules of Land Warfare, No. 306.

[5] See correspondence in American White Book, European War, II, 97-108, respecting Belgian relief in 1914 and 1915.

See also correspondence between the American ambassador at London, and the British foreign office in July, 1916, concerning the relief of allied territories in the occupation of the enemy (Misc. No. 24 [1916], cd. 8295).

[6] See note verbale from the German foreign office, Nov. 30, 1914, enclosed in communication of Mr. Gerard, American ambassador at Berlin, to Mr. Bryan, Secretary of State, Dec. 14, 1914 (American White Book, European War, III, 359); also note verbale from the German foreign office, Jan. 3, 1915, enclosed in communication of Mr. Gerard to Mr. Bryan, Jan. 11, 1915 (id. 360).

German Empire, and subject to its military jurisdiction.[1] This response is believed to have been sound in theory.

(5)

MARTIAL LAW.

The term "martial law," in so far as it is used to describe any fact in relation to belligerent occupation, does not refer to a particular code or system of law, or to a special agency entrusted with its administration. The term merely signifies that the body of law actually applied, having the sanction of military authority, is essentially martial.[2] All law, by whomsoever administered, in an occupied district is martial law; and it is none the less so when applied by the civil courts in matters devoid of special interest to the occupant. The phrase "martial law" is doubtless suggestive of the power of the occupant to shape the law as he sees fit; that is, to determine what shall be deemed lawful or unlawful acts, to establish tests for ascertaining the guilt of offenders, to fix penalties, and generally to administer justice through such agencies as are found expedient.

In a broad sense, therefore, martial law is that which must of necessity exist within any place controlled by a belligerent army, whether operating in the field or possessing the status of an occupant of hostile territory. That law is a direct and immediate consequence of the military achievement, rather than a special result of affirmative action by a military commander as a lawgiver.[3] Martial law emphasizes what exists rather than what ought to be. Whether the law prevailing within an occupied district accords with the usages of war,

[1] See Mr. Bryan, Secretary of State, to Mr. Gerard, ambassador at Berlin, Jan. 21, 1915 (American White Book, European War, III, 361); also Mr. Lansing, Secretary of State, to Mr. Penfield, ambassador at Vienna, telegram, Nov. 23, 1915 (id. 366); telegram of Acting Secretary of State to Mr. Gerard, July 12, 1916 (id. 368).

See contra, Belgian protest communicated by the Spanish Government to the German foreign office, and discussed in communication therefrom to the Spanish Embassy at Berlin, Jan. 3, 1915, enclosed in communication of Mr. Havenith, Belgian minister at Washington, to Mr. Bryan, Secretary of State, Feb. 13, 1915 (id. 363).

[2] According to the Rules of Land Warfare, No. 14 (following Gen. Orders No. 100, Apr. 24, 1863), "Martial law is simply military authority exercised in accordance with the laws and usages of war." According to No. 15, "martial law extends to property and to all persons in the occupied territory, whether they are subjects of the enemy or aliens to that Government."

"The martial law of international jurists consists of the regulations which by convention or approved custom are agreed on as internationally binding for the relations between invaders and invaded, and, as such, is not peculiar to the cases in which invasion has ripened into occupation. It comes into play from the first moment of an invasion, but during an occupation its rules are increased in stringency in proportion to the greater security which the invader claims to enjoy in the midst of a population which he benefits by maintaining social order among them." (Westlake, 2 ed. II, 99.)

See also G. B. Davis (Int. Law, Sherman's 4 ed. 333); opinion of Chief Justice Waite, in behalf of the court in United States *v.* Diekelman (92 U. S. 520, 526).

[3] "A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the martial law of the invading or occupying army, whether any proclamation declaring martial law or any public warning to the inhabitants, has been issued or not. Martial law is the immediate and direct effect and consequence of occupation or conquest." (Gen. Orders, No. 100, Apr. 24, 1863, § 1; Moore, Dig. VII, 275.) See also §§ 2–13, id.

depends upon the requirements of the law of nations.[1] The restraints imposed by it are observed in what may be called the law of belligerent occupation. Hence the term "martial law" has no special significance in international law other than as a broadly descriptive phrase, for it does not serve to point out any limit or token of legitimate belligerent action.

The practice of proclaiming the fact of occupancy and of announcing the policy to be followed respecting the inhabitants of the district, may have encouraged the conclusion that martial law is a body of rules which the occupant may affirmatively establish, and which do not come into being until he takes steps appropriate to that end. In the course of his task of administration he necessarily distinguishes between those who defy his authority by committing crimes affecting the safety of his army, and those whose conduct, however illegal, lacks such a character.[2] Possibly the circumstance that individuals of the former class need to be tried before military tribunals while the local civil courts are permitted simultaneously to exercise jurisdiction in criminal cases of the latter class, may impel the inference that martial law (even in the case of belligerent occupation) is a special code applicable to offenses directed against military authority and applied by military tribunals. If the occupant fixes the jurisdiction of a court, and adjusts the procedure and the penalty (in case of guilt) according to the nature of the offense, he merely manifests the effort to establish a flexible system adapted to the requirements peculiar to his needs. Such procedure fails, however, to indicate any limitation of power possessed by him. Nor does it warrant the conclusion that any law applied by any tribunal in consequence of the commission by any individual of any act within the occupied territory is not a martial law. These two circumstances—the power of the occupant, and his actual supremacy attributable to it, are the pregnant facts which justify the attempt to describe the law prevailing in any place occupied by a hostile belligerent force as martial law. The legal value of that descriptive term is not, however, considerable; and its use in this connection is perhaps unfortunate in view of its employment elsewhere to signify "the justification by the common law of acts done by necessity for the defense of the Commonwealth when there is war within the realm." [3]

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[1] See opinion of Mr. Cushing, Attorney General, Feb. 3, 1857 (8 Op., 365, 369).

[2] See Rules of Land Warfare No. 299, and note 1 appended thereto.

[3] See Sir Frederick Pollock, "What is Martial Law?" (L. Q. Rev. XVIII, 152, 156.) See also W. S. Holdsworth, "Martial Law Historically Considered" (id. 117); H. Erle Richards, "Martial Law" (id. 133); Cyril Dodd, "The Case of Marais" (id. 143).

See also in this connection W. E. Birkhimer (Military Government and Martial Law, part II, 371-580); dictum of Chase, Chief Justice, in ex parte Milligan (4 Wall. 2, 141, 142), and comment thereon in Rules of Land Warfare, No. 14, note 1; Johnson v. Jones (44 Ills., 142, 153-155); Lawrence B. Evans (Leading Cases on Int. Law, 110, note).

PART II.

PRELIMINARY NOTES ON THE LAW OF NATIONS APPLICABLE TO AN ARMY IN THE FIELD.

CONTENTS.

PRELIMINARY NOTES ON THE LAW OF NATIONS APPLICABLE TO AN ARMY IN THE FIELD.

a.

Permissible Violence Generally—Military Necessity.

Military necessity, as understood by the United States, justifies a resort to all measures which are indispensable to bring about the complete submission of the enemy by means of regulated violence and which are not forbidden by the modern laws and customs of war.[1] It becomes important, therefore, to observe what those laws and customs are deemed to forbid, and, conversely, what they are believed to permit.

According to the Rules of Land Warfare of 1917, military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is *unavoidable* in the armed contests of war; it allows of the capturing of every armed enemy and of every enemy of importance to the hostile Government or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever the enemy's country affords that is necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith, either positively pledged regarding agreements entered into during the war, or supposed by the modern law of war to exist.[2]

Military necessity does not, it is said, "admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult."[3]

From the foregoing statement it is apparent that military necessity is in theory based upon the needs of a belligerent force, and at the same time takes cognizance of the equities of those whom it may op-

[1] See sections 10 and 11, Rules of Land Warfare. Observe the contrasting phraseology of section XIV, Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, Apr. 24, 1863 (Moore, Dig VII. 178), in which it is stated that military necessity "consists in the necessity of those measures which are indispensable for securing the ends of the war and which are lawful according to the modern law and usages of war."

[2] Section 12, Rules of Land Warfare.

[3] See section 13, Rules of Land Warfare.

pose. In estimating their relative values it heeds the requirements of the commander of an army in securing the objects of war and in protecting the safety of his own troops. In this respect it appears to open broad and convenient avenues of procedure, the use of which implies no wrongfulness of conduct. On the other hand, as an instrument of justice in a scheme of justice, it necessarily pays respect to the rights of those, both combatant and noncombatant, belligerent, and neutral, against whom force is employed. For that reason it never overrides any solid claim to protection from injustice.

In a word, military necessity, as understood by the United States, does not purport to indicate circumstances when a belligerent commander or State is free from a duty to observe the law of nations. It does not embody a formulation of excuses for lawlessness. It does not signify the use of force in opposition to law. It betokens rather the extent and mode of violence which, in accordance with law, and therefore with propriety, may, under varying circumstances, be employed in the prosecution of war. If the term military necessity implies great latitude, and is invoked by way of excuse in justification of harsh measures, it is because the law of nations itself permits recourse thereto in case of imperative need, and allows a belligerent commander to be the judge of the existence of the need.

An impressive although unfortunate aspect of international arrangements respecting land warfare is the tendency to cause the operation of restrictions of acts regarded as normally improper, to be dependent upon the judgment of the individuals whom they purport to restrain. This tendency breeds confusion of thought, inasmuch as it serves to give an appearance of lawlessness to acts which in reality conform to what is required. It allows too much to rest upon the character, temperament, and training of a commanding officer, and permits in consequence, opposing armies, under similar circumstances, to resort to widely differing practices without exposing either to just charges of misconduct.[1]

b.

Sieges and Bombardments.

A belligerent commander may lawfully lay siege to a place controlled by the enemy and endeavor by a process of isolation to cause its surrender.[2] The propriety of attempting to reduce it by starva-

[1] See, for example, Article XXIII (g), Hague regulations annexed to the convention of 1907, concerning the Laws and Customs of War on Land (Malloy's Treaties, II, 2285, Rules of Land Warfare, p. 161, Appendix 2).

[2] "Assault is the rush of an armed force upon enemy forces in the battlefield, or upon intrenchments, fortifications, habitations, villages, or towns, such rushing force committing every violence against opposing persons and destroying all impediments. Siege is the surrounding and investing of an enemy locality by an armed force, cutting off those inside from all communication for the purpose of starving them into surrender or for the purpose of attacking the invested locality and taking it by assault. Bombardment is the throwing by artillery of shot and shell upon persons and things. Siege can be accompanied by bombardment and assault, but this is not necessary, since a siege can be carried out by mere investment and starvation caused thereby. Assault, siege, and bombardment are severally and jointly perfectly legitimate means of warfare." (Oppenheim, 2 ed. II, §155.)

tion is not questioned.[1] Hence the cutting off of every source of sustenance from without is deemed legitimate.[2] It is said that if the commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure to drive them back, so as to hasten the surrender.[3]

At the present time a siege is commonly supplemented by bombardment.[4] There is no rule of law which compels the commander of an investing force to authorize the population, including women, children, aged, sick, wounded, subjects of neutral powers, or temporary residents, to leave the locality, even when a bombardment is about to commence. It is entirely within the discretion of the besieging commander whether he will permit them to leave or not, and under what conditions.[5]

According to the regulations annexed to The Hague Convention of 1907, respecting the Laws and Customs of War on Land, it is forbidden to attack or bombard, by any means whatever, towns, villages, dwellings or buildings, which are undefended.[6] It must be clear that a town does not necessarily cease to be defended because it lacks fortifications, and that conversely, an unfortified place possessing a military force or a population rising in armed resistance must be regarded as defended. According to Prof. Westlake "A place can not be said to be undefended when means are taken to prevent an enemy from occupying it. The price of immunity from bombardment is that the place shall be left open for the enemy to enter."[7] A place thus open for the enemy may, nevertheless, contain plants for the manufacture of munitions, military stores, arsenals, or other buildings of a like nature. The right of the enemy to destroy them seems to be obvious, and the mode of so doing, whether by bombardment or otherwise, to depend upon whether serious effort

[1] "War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjugation of the enemy." (§ XVII, General Orders, No. 100, of 1863, quoted in § 173, note I, Rules of Land Warfare.)

[2] According to section 224 of Rules of Land Warfare, "The commander of the investing force has the absolute right to forbid all communication between the besieged place and the outside. The application of this rule to diplomatic envoys of neutral powers is unsettled."

Section 219 of the Rules of Land Warfare provides that "Diplomatic agents of a neutral power should not be prevented from leaving a besieged place before hostilities commence. This privilege can not be claimed while hostilities are in progress. The same privileges should properly be accorded to a consular officer of a neutral power. Should they voluntarily decide to remain, they must undergo the same treatment as the other inhabitants."

[3] See section 222, Rules of Land Warfare; also section XVII, General Orders, No. 100, of 1863.

[4] See for example, the siege of Port Arthur by Gen. Baron Nogi, in 1904 (Takahashi, Int. Law Applied to the Russo-Japanese War, 195–208).

[5] The language of the text is that of section 218, Rules of Land Warfare, citing action of Gen. Scott in refusing further truce to consuls at Vera Cruz (Moore, Dig. VII, 180; Scott, Autobiography, II, 426–428, and quoting communication of Gen. Baron Nogi, to the commander of the Russian forces at Port Arthur, Aug. 16, 1904.)

See also sections 220, 221, and 223. Rules of Land Warfare.

[6] See Article XXV (Malloy's Treaties II, 2286).

[7] See International Law, 2 ed. II, 182, in relation to naval warfare.

See also discussion by J. W. Garner in American Journal, IX, 98–99.

is made to safeguard them from attack. On the other hand, it is not believed that the mere presence of such works, if not sought to be protected, would transform an open town into a defended place, and expose it to treatment as such.[1]

The Hague regulations do not appear to forbid the bombardment of places which are unfortified or otherwise unable to oppose attack, if they are in fact by any process defended. This would be true in the case of a town itself incapable of offering any resistance, if defended by guns mounted outside of its limits, even though not in close proximity thereto. The enemy might, without violating any prohibition of the regulations, attack the town as a means of silencing the batteries defending it. It is believed that a place itself incapable of resistance should in general be immune from bombardment, and that the validity of the claim should depend upon the impotence of the inhabitants to do harm to the enemy, rather than upon the absence of benefits sought to be derived by them from instruments of defense wheresoever located.[2] In a word, attack and bombardment should, on principle, be confined so far as possible, to places possessing means of resistance, or strategic advantages utilized as such by the possessor of them.[3]

Before undertaking a bombardment, the commander of the attacking force is obliged, according to The Hague regulations, except in case of open assault, to do all that lies in his power to give warning to the authorities.[4]

It is declared that in sieges and bombardments every precaution is to be taken to spare, as much as possible, buildings devoted to religious worship, to the arts and sciences, to charity, and to hospitals and places where the sick and wounded are collected, and to historical monuments, provided that they are not used at the same time for military purposes. The besieged are enjoined to indicate these edifices or places by some particular and visible signs, which should previously be notified to the assailants.[5] An attacking force may be

[1] According to section 214 of the Rules of Land Warfare, defended places include the following:

"(*a*) A fort or fortified place.

"(*b*) A town surrounded by detached forts is considered jointly with such forts as an indivisible whole, as a defended place.

"(*c*) A place that is occupied by a military force or through which such force is passing is a defended place. The occupation of such place by sanitary troops alone is not sufficient to consider it a defended place."

[2] See Hague Convention of 1907, respecting Bombardment by Naval Forces in Time of War (Malloy's Treaties, II, 2314), contained also in Rules of Land Warfare (§ 212, note 1).

[3] Thus a high tower or lofty spire in an undefended place, if utilized as a means of observing the movements of an approaching hostile force, might be fairly destroyed by the latter.

[4] See Article XXVI.

According to section 217, Rules of Land Warfare: "Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity."

[5] See Article XXVII.

See, in this connection, section 226, Rules of Land Warfare.

unable to detect, or if detecting them, to spare buildings or monuments of the kind specified.[1] Obviously, their use for military purposes destroys the foundation of any just claim to immunity.[2] No duty is imposed upon the occupant of a bombarded place to give assurance to an attacking force that structures adapted for military use by reason of their height or location are not and will not be so employed.[3]

In case of bombardment, the attacking force is not required by The Hague regulations to confine its operations to fortifications. Subject to the limitations noted, such a force is free to destroy any edifices, public or private; and it may be expected so to direct its fire as to cause the reduction of the bombarded place by the surest and quickest process.[4]

c.

SEIZURE, DESTRUCTION, AND DEVASTATION OF ENEMY PROPERTY.

The right of a military commander to destroy or seize property of the enemy is of vast importance and yet capable of grave abuse. Its exercise is forbidden by The Hague regulations of 1907, except when destruction or seizure is "imperatively demanded by the necessities of the war."[5] As such an officer is the judge of the existence of the requisite necessity, it is doubtless important to endeavor to observe the circumstances when he may be regarded as reasonably rather than arbitrarily resorting to either practice. This task presents, however, an insurmountable difficulty because of the sharply divergent views of military men of differing races, traditions, and training. It is highly improbable, for example, that the judgment of a German officer would coincide with that of an American commander in questioning the propriety of a particular act of destruction, or that the former would share the reluctance of the latter to seize property within his reach. Rules of an international convention are for the guidance of armies of all of the contracting parties, and hence become abortive when failing to impose upon the forces of each equal restraint from what is sought to be forbidden. Provisions which, therefore, extend in terms wide latitude to commanding officers, are bound, in the stress of war, to receive a variety of interpretations, and so to be productive of acts

[1] See, for example, correspondence in December, 1904, between Gen. Baron Nogi, besieging Port Arthur, and Gen. Stoessel, commanding the besieged place, contained in Takahashi (Int. Law Applied to the Russo-Japanese War, 195-200).

See also the account given by Gen. Scott of the siege of Vera Cruz, in March, 1847 (Scott, Autobiography II, 426-428; Moore, Dig. VII, 180).

[2] See section 228, Rules of Land Warfare.

[3] Practical difficulties in the way of giving such an assurance and of convincing the enemy of its value are not to be underestimated. Nevertheless, such an achievement appears to offer the only means of making really safe buildings or places of the type described in the text.

[4] See Oppenheim, 2 ed., section II, 158.

[5] See Article XXIII (g).

which, however savoring of injustice, are not regarded by the actors or their Governments as an infringement of any contractual duty. The Hague regulations with respect to the seizure and destruction of enemy property seem to be open to such an objection.[1]

It seems to be acknowledged that a commanding officer may seize or destroy enemy property which, unless seized or destroyed, presents an obstacle to a military operation or jeopardizes the safety of his troops. This principle may be fairly invoked in offensive or defensive movements. It is applicable to a variety of situations less obvious to the civilian than the soldier. It finds expression in the Instructions for the Government of the Armies of the United States in the Field, of 1863,[2] and again in the Rules of Land Warfare of 1917, and will be utilized by American officers whenever appropriate occasion arises. Hence it is not unreasonable to refer to the right as one the normal user of which is not exceptional.[3] It is important, however, to bring home to a belligerent commander a clear understanding of the wrongfulness of seizure or destruction when no imperative necessity arises, and when no special problem of defense is concerned. It is believed that this might be accomplished by the specification of certain acts which are rarely to be deemed capable of removing a military obstacle or of preserving the safety of a force, and of others which are never to be held to possess such a quality.[4]

The Hague regulations of 1907 declare, for example, that the pillage of a town or place, even when taken by assault, is prohibited; and the military occupant is subjected to a like prohibition.[5]

According to the Rules of Land Warfare, all destruction of property not commanded by the authorized officer, all pillage or sacking, even after taking a town or place by assault, are prohibited under the penalty of death, or such other severe punishment as may seem adequate to the gravity of the offense.[6] The wanton destruction of property must ever be regarded as contrary to international law.[7] That, for example, of the City of Washington by British forces in the course

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[1] If greater and more uniform restraint is to obtain hereafter among belligerent States, it will be due in part to forms of general agreement which, on the one hand advert to the reasons justifying seizure or destruction of enemy property, and on the other state with precision the limits of the right, and prohibit definitely certain conduct never to be deemed a reasonable exercise of it.

[2] See Section XV, General Orders, No. 100, Apr. 24, 1863 (Moore, Dig. VII, 178).

[3] According to section 332 of the Rules of Land Warfare: "The rule is that in war a belligerent can destroy or seize all property of whatever nature, public or private, hostile or neutral, unless such property is specifically protected by some definite law of war, provided such destruction is imperatively demanded by the necessities of war." It is appended in a note that the only property safeguarded is the matériel of the mobile sanitary formations under the Geneva Convention.

See also Ford *v.* Surget (97 U. S., 594, 606; Moore, Dig. VII, 301, 302).

[4] The task of specification is a military rather than a legal one, the function of the lawyer being merely to point out the general principle which the soldier should endeavor to observe. For the civilian without military training or experience to lay down hard and fast rules for the guidance of armies in the field is to assume a rôle as impressive as that of the clergyman who ventures to prescribe the diet of his parishioners.

[5] See Article XXVIII (Malloy's Treaties, II, 2286); also Article XLVII (id. 2289).

[6] See section 340.

[7] See Borchard (Diplomatic Protection, 261, note 2), for list of cases where awards have been made by arbitral tribunals for acts of wanton destruction and pillage.

of the War of 1812, was an instance which it is believed that all enlightened Englishmen must now condemn as vigorously as did Sir James Mackintosh in the House of Commons, on April 11, 1815.[1]

One form of destruction—the general devastation of an area within enemy territory—deserves consideration. It is believed that the necessity adequate to justify recourse to such procedure must be one connected with some immediate military operation, whether offensive or defensive, as a means, for example, of preventing the surrender of an army.[2] Recourse thereto would not be justified at the present time, according to American or British opinion, apart from the requirements of The Hague regulations, as a general measure to terrorize the enemy or weaken his economic position.[3] It remains for expert military opinion to indicate the circumstances when devastation may be fairly regarded as a necessary adjunct of an existing operation. Even when it possesses such a character devastation should never be permitted to embrace a deliberate effort to cast a permanent or long-enduring blight on the land. To render its fields sterile, its waters poisonous, and the area long incapable of sustaining human life must be deemed intolerable, because of the entire absence of any connection between such an achievement and the military operations of the devastator.[4]

An army operating in the field, whether or not in enemy territory, is obviously entitled to a freedom of action with respect to seizure and destruction that is not enjoyed during the belligerent occupancy of a hostile region over which complete control has been gained by force. It is not until the latter is invaded that such an occupant is in a position where he becomes engaged in offensive or defensive operations. Thus it is that the varied and numerous restric-

[1] See Wharton (Dig. III, 335), citing Hansard (Parl. Debates, 526), and quoted in Moore (Dig. VII, 200). President Madison, proclamation, Sept. 1, 1814 (Richardson's Messages, I, 545; Moore, Dig. VII, 200).

See also Retaliation, infra.

[2] It is well said in section 334 of the Rules of Land Warfare: "As an end in itself, as a separate measure of war, devastation is not sanctioned by the law of war. There must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army."

[3] See section 334, Rules of Land Warfare.

German opinion is otherwise. Thus Prof. Lueder declared: "That ravage, burning, and devastation, even on a large scale, as of whole neighborhoods and tracts of country, may be practiced where it is not a question of any particular determinate result or strategical operation, but only of more general measures, as in order to make the further advance of the enemy impossible, or even to show him what is war in earnest when he persists in carrying it on without serious hope, and so compel him to make peace—this can not be denied in cases of real necessity, as of a well-grounded *kriegsraison*. But it is only in such cases that it can not be denied, and if measures of that kind are taken otherwise than under the most extreme compulsion, they are great and inhuman offenses against international law." (In Holtzendorff's Handbuch des Völkerrechts, IV, sec. 114, p. 484, as quoted in Westlake, Collected Papers, 246.) Prof. Westlake added by way of comment that "it need not be greatly feared that Prof. Lueder's own Government will ever give effect to his doctrine by ordering the devastation of a whole region as an act of terrorism." (Id. 247.) What German forces were ordered to do in France in 1917 was not anticipated.

[4] The devastation by a German army of a wide area of French territory in the spring of 1917, is understood to have been designed not merely to safeguard the retreat of a large force, or to interfere with the operations of the enemy, but also, as a distinct war measure, to render the land as uninhabitable for man as it lay within the power of the devastator to make it.

tions imposed upon him with respect to the treatment of enemy property are not applicable to the conduct of a mobile force actively participating in a hostile movement.[1]

d.

Measures of Concentration.

As a measure of war and for the purpose of cutting off supplies from the enemy, a belligerent would appear to have the right to cause the agricultural inhabitants within its own domain to be concentrated within specified places. Regardless of their military efficacy, such measures fail to possess international significance, except in so far as the persons or property of neutrals are thereby affected.

In 1897 Spanish authority had recourse to such procedure in Cuba. "The productive districts controlled by the Spanish armies were depopulated. The agricultural inhabitants were herded in and about the garrison towns, their lands laid waste and their dwellings destroyed."[2] Against this policy of devastation the United States made vigorous protest because the interference with the elementary rights of human existence tended to inflict suffering on innocent noncombatants, to destroy the value of legitimate investments, and to extinguish the natural resources of the country in the apparent hope of crippling the insurgents. Hundreds of American citizens were among the thousands of reconcentrados whose death from starvation or pestilence was saved only by relief furnished by American agencies.[3] Even this aid failed to prevent great loss of life. The helplessness of the authorities of towns themselves virtually bank-

[1] The chief function of an army in the field is to fight, while that of the belligerent occupant is to administer what has been won. Hence the restrictions imposed upon the former differ sharply in design and operation from those applicable to the latter. The reason for the distinction is simply the fact that such an occupant does not need to make use of the same amount or kind of force that an army in the field may be obliged at any moment to exercise. Thus it is that The Hague regulations of 1907, confine to Section III (Arts. XLII-LVI), entitled "Military Authority Over the Territory of the Hostile State," the several injunctions respecting the treatment of property, save the prohibition of pillage, which is also set forth in an earlier section (Art. XXVIII), and the appeal for restraint in Article XXIII (g). Practically the same theory prevails in the plan of the Instructions for Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, a code which, notwithstanding its title, makes provision also for the duties of the belligerent occupant.

[2] See President McKinley, annual message, Dec. 6, 1897 (For. Rel. 1897, xii; Moore, Dig. VII, 212).

[3] See Mr. Sherman, Secretary of State, to Mr. Dupuy de Lôme, Spanish minister to the United States, June 26, 1897 (For. Rel. 1897, 507; Moore, Dig. VII, 213), in which it was also said: "Against these phases of the conflict, against this deliberate infliction of suffering on innocent noncombatants, against such resort to instrumentalities condemned by the voice of humane civilization, against the cruel employment of fire and famine to accomplish by uncertain indirection what the military arm seems powerless to directly accomplish, the President is constrained to protest in the name of the American people and in the name of common humanity. The inclusion of a thousand or more of our own citizens among the victims of this policy, the wanton destruction of the legitimate investments of Americans to the amount of millions of dollars, and the stoppage of avenues of normal trade—all these give the President the right of specific remonstrance, but in the just fulfillment of his duty he can not limit himself to these formal grounds of complaint. He is bound by the higher obligations of his representative office to protest against the uncivilized and inhumane conduct of the campaign in the island of Cuba. He conceives that he has a right to demand that a war, conducted almost within sight of our shores and grievously affecting American citizens and their interests throughout the length and breadth of the land, shall at least be conducted according to the military codes of civilization."

rupt, to give relief to the thousands forced upon them produced inevitable hardship, to which was superadded extermination by starvation.[1] This cruel and arbitrary mode of applying severe measures not purporting to be related to the operations of military forces, but rather to be employed as a substitute therefor, justified the protests of a foreign State whose nationals were among the victims of oppression.[2]

The foregoing case illustrates the abuse of a belligerent right which in theory might be exercised in suppressing insurrection or in a foreign war without impropriety. It is conceivable that in aid of a military operation of an army in the field the concentration of the inhabitants of the territory for the time being under military control, might not be unreasonably effected, provided adequate steps were taken to safeguard the noncombatants involved from hunger and pestilence.[3]

e.

Deceit.

A belligerent may not unlawfully attempt to deceive the enemy.[4] The processes of so doing are numerous. Their enumeration and operation are matters of military rather than of legal science. In general, resort thereto "for mystifying or misleading the enemy, which the enemy ought to take measures to secure himself against, such as the employment of spies, inducing soldiers to desert, to surrender, to rebel, or to give false information to the enemy," is said to be justifiable.[5] The law of nations, as understood by the United States, admits of deception but disclaims perfidy or treachery.[6] As between enemies, there is on principle required fidelity to an undertaking or representation given for the purpose of causing an adversary to refrain from the use of force which it would otherwise surely exercise.[7] Such a purpose is always implied when a flag of truce or the Red Cross of the Geneva Convention is displayed, because of the

[1] See same to same, Nov. 6, 1897 (For. Rel. 1897, 509; Moore, Dig. VII, 214).

[2] See Foreign Relations, 1897, 510 (Moore, Dig. VII, 215), indicating the adoption by Gen. Blanco, the successor of Gen. Weyler as Governor General of Cuba, of measures for the organization of extensive zones of cultivation, for furnishing work and food, and otherwise improving the lot of the reconcentrados.

[3] Concerning the concentration camps established by Great Britain during the South African War, see Oppenheim (2 ed. II, 191, note 1, and authorities there cited).

[4] According to Article XXIV of the regulations annexed to The Hague Convention of 1907, respecting the Laws and Customs of War on Land: "Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible." (Malloy's Treaties, II, 2286.)

[5] See Rules of Land Warfare, section 191; also generally, id. sections 189–198.

See also Bonfils-Fauchille (7 ed. sections 1073–1076); Oppenheim (2 ed. II, sections 163–165).

[6] See section 192, Rules of Land Warfare; also section XVI, General Orders, 100, 1863 (Moore, Dig. VII, 178).

[7] "Deceit against an enemy is, as a rule, permitted; but it is clearly understood that this does not embrace the abuse of signs which are employed in special cases to prevent the exercise of force or to secure immunity from it." (Moore, Dig. VII, 191, quoting Hall, 5ed. 535–537.)

representation that the emblem betokens the presence of persons or things which, for the time being, are harmless, and hence entitled to immunity from attack. The abuse of either is, therefore, perfidious.[1]

The question presents itself whether the use of the national flag, or military insignia, or uniform of the enemy is to be similarly regarded. The instructions for the Government of the Armies of the United States in the Field expressly denounce "the use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle," as "an act of perfidy by which they lose all claim to the protection of the laws of war." [2] The Hague regulations of 1907, forbid any "improper use" of such articles.[3] As those regulations also require a military force to have a "fixed distinctive emblem recognizable at a distance" in order to claim belligerent qualifications, the adoption of that of the enemy although prior to an engagement, would seem to be rendered "improper." [4] If to battle with the enemy under his own flag is an act of perfidy, it is difficult in theory to regard in a different light such employment of his emblem before an engagement as enables the employer to gain a position where he may fight to advantage.[5] In both cases the enemy refrains from attack because of a deception which amounts to an assurance that the emblem employed is his own, and that those who bear it will not fire upon him. Hence it is suggested that in a general recodification of the regulations or war, both forms of conduct be expressly prohibited. In order to ameliorate conditions of land warfare and to abolish acts of ruthlessness which have characterized the European conflict, it is imperative that both those charged with the task of codification, and those entrusted with the discipline of armies, should unite in denouncing as invariably illegal every form of deception which savors of bad faith.[6]

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[1] See Viscount Bryce (Report of Committee on Alleged German Outrages, Appendix, 206–215), embracing impressive evidence of the abuse of the Red Cross and of the white flag on numerous occasions by German forces in Belgium.

[2] See Rules of Land Warfare, §196; also §LXV, General Orders, No. 100, of 1863.

[3] See Article XXIII (f) (Malloy's Treaties, II, 2285).

[4] See Article I (id. II, 2281). Compare interpretation of this article in section 196, Rules of Land Warfare. Declares Oppenheim: "The use of the enemy uniform for the purpose of deceit is different from the case when members of armed forces who are deficient in clothes wear the uniforms of prisoners or of the enemy dead. If this is done—and it always will be done if necessary—such distinct alterations in the uniform ought to be made as will make it apparent to which side the soldiers concerned belong." (2 ed. II, 202, note 3.)

[5] Declares Hall: "A curious arbitrary rule affects one class of stratagems by forbidding certain permitted means of deception from the moment at which they cease to deceive. It is perfectly legitimate to use the distinctive emblems of an enemy in order to escape from him or to draw his forces into action; but it is held that soldiers clothed in the uniforms of their enemy must put on a conspicuous mark by which they can be recognized before attacking, and that a vessel using the enemy's flag must hoist its own before firing with shot and shell." (6 ed. 533, 534, quoted in Moore, Dig. VII, 191.)

[6] American practice is believed to have been singularly free from criticism. "In this country it has always been authorized to utilize uniforms captured from the enemy, provided some striking mark or sign is attached to distinguish the American soldier from the enemy. All distinctive badges or marks of the enemy should be removed before making use of them. It is believed that such uniforms should not be used except in case of absolute necessity." (§197, Rules of Land Warfare.) The practice has thus been robbed of any improperly deceptive aspect.

f.

CERTAIN IMPLEMENTS OF DESTRUCTION.

(1)

IN GENERAL.

Whatever be regarded as the end of war, that of any implement of destruction such as a projectile is to disable the greatest possible number of men. The Declaration of St. Petersburg of 1868 announced that "that object would be exceeded by the employment of arms which would needlessly aggravate the sufferings of disabled men, or render their death inevitable," and that the use of such arms would, therefore, be contrary to the laws of humanity.[1] In the same spirit The Hague Regulations of both 1899 and 1907 declare that the right of belligerents to adopt means of injuring the enemy is not unlimited, and that it is "especially prohibited to employ arms, projectiles, or materials of a nature to cause superfluous injury."[2] The value of approval of this principle depends upon the agreement of military authorities as to what implements or materials possess such a character. Unhappily such authorities have not been of one mind. Those representing the United States at the First Hague Peace Conference in 1899 found it impossible to acquiesce in views prevailing among a majority of the delegates there assembled.[3] The Second Hague Peace Conference devoted slight attention to the matter. At the outbreak of the European War in 1914, the participants therein were by no means in agreement. From the experience of that conflict the several belligerents, including the United States,

[1] See Martens, *Nouv. Rec. Gén.*, XVIII, 474, also published in Oppenheim, 2ed., II, Appendix, 2, p. 584; Hershey, 389; A. P. Higgins, Hague Peace Conferences, 5. See also Bonfils-Fauchille, 7ed., §1066–1067; Bordwell, 278–279.

[2] See Arts. XXII and XXIII (e), Malloy's Treaties, II, 2052 and 2285, respectively. In that compilation the words "*des maux superflus*" of the original text are translated as "superfluous injury," in the Regulations of 1899, and as "unnecessary suffering" in those of 1907.

According to §125, Rules of Land Warfare, the prohibition of the Regulations "is not intended to apply to the use of explosives contained in artillery projectiles, mines, aerial torpedoes, or hand grenades, but it does include the use of lances with barbed heads, irregular shaped bullets, projectiles filled with glass, etc., and the use of any substance on these bullets that would tend to unnecessarily inflame a wound inflicted by them, and the scoring of the surface or filing off the ends of the hard case of such bullets. It is believed that this prohibition extends to the use of soft-nosed and explosive bullets, mentioned in paragraph 175 and note."

According to §186, of the Rules of Land Warfare: "Train wrecking and setting on fire camps or military depots are legitimate means of injuring the enemy when carried out by the members of the armed forces. Wrecking trains should be limited strictly to cases which tend directly to weaken the enemy's military forces."

[3] See Report of the American delegates to the First Hague Peace Conference to the Secretary of State July 31, 1899 (For. Rel. 1899, 513, 515, Moore, Dig., VII, 206), in which it was said: "The American commission approached the subject of the limitation of invention with much doubt. They had been justly reminded in their instructions of the fact that by the progress of invention, as applied to the agencies of war, the frequency, and, indeed, the exhausting character of war had been, as a rule, diminished rather than increased. As to details regarding missiles and methods, technical and other difficulties arose which obliged us eventually, as will be seen, to put ourselves on record in opposition to the large majority of our colleagues from other nations on sundry points. While agreeing with them most earnestly as to the end to be attained, the difference in regard to some details was irreconcilable. We feared falling into evils worse than those from which we sought to escape."

See also instructions to the American delegates, For. Rel. 1899, 511, 512, Moore, Dig., VII, 205.

have doubtless drawn conclusions tending to unite rather than divide military opinion concerning the relative efficacy of instrumentalities necessarily productive of great suffering, and as to certain ones the use of which is bound to cause injuries which enlightened States should deem superfluous. The insufficiency of existing arrangements, notwithstanding their recognition of the legal principle involved, makes imperative general international agreement specifying in detail instrumentalities the use of which are to be forbidden, as well as also the theory on which the prohibition rests. It should be observed, however, that the task of specification is a military rather than a legal one, calling for expert opinion as to whether the blows capable of being dealt by new and various instrumentalities designed and employed in the European War, possess a technical value which outweighs in significance the severity and magnitude of the suffering caused by their use.[1]

(2)

EXPANSIVE, EXPLOSIVE, AND OTHER BULLETS.

At the First Hague Peace Conference of 1899 Capt. Crozier of the American delegation proposed that "the use of bullets which inflict wounds of useless cruelty, such as explosive bullets and in general every kind of bullet which exceeds the limit necessary for placing a man immediately *hors de combat*, should be forbidden."[2] The Conference did not, however, accept the proposal, and adopted in its stead a declaration announcing that the contracting parties agreed to abstain from the use of bullets "which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions."[3] The American delegation did not sign the declaration, nor did the United States adhere to it.[4] The declaration was, however, signed by

[1] In responding to this inquiry military men must reckon with the public opinion of the world, which at the present time will not permit responsible statesmen to follow blindly the views of the most expert advisers, if they appear indifferent to the sufferings of soldiers as well as civilians, and so fail to heed the claims for humane treatment on the part of those likely to be called upon to fight in case of war.

[2] See *Conférence Internationale de la Paix*, 75; F. W. Holls, Peace Conference at The Hague, 511–514.

By the Declaration of St. Petersburg of 1868 (to which the United States was not a party), the contracting parties agreed to renounce mutually, in case of war among themselves, by their forces on land or sea, any projectile weighing less than 400 grams, which was either explosive or charged with fulminating or inflammable matter. (See *Nouv. Rec. Gén.*, XVIII, 474; Hershey, 389; Oppenheim, 2 ed. II Appendix, p. 584.)

[3] See *Conférence Internationale de la Paix*, 250; F. W. Holls, Peace Conference at The Hague, 98–117.

See, also, Percy Bordwell, 128–134; A. P. Higgins, Hague Peace Conferences, 495–497; Geo. B. Davis, in American Journal, II, 74 and 528; Hershey, bibliography in note 48, p. 391.

[4] The following criticism of the declaration was made by Capt. Crozier before The Hague Conference: "First, that it forbade the use of expanding bullets, notwithstanding the possibility that they might be made to expand in such regular manner as to assume simply the form of a larger caliber, which properly it might be necessary to take advantage of, if it should in the future be found desirable to adopt a musket of very much smaller caliber than any now actually in use. Second, that by thus prohibiting what might be the most humane method of increasing the shocking power of a bullet and limiting the prohibition to expanding and flattening bullets, it might lead to the adoption of one of much more cruel character than that prohibited. Third, that it condemned by designed implication, without even the introduction of any evidence against it, the use of a bullet actually employed by the army of a civilized nation." (F. W. Holls, Peace Conference at The Hague, 513; Bordwell, 133.)

See also Rules of Land Warfare, section 175.

delegations representing sixteen States, and was formally accepted by numerous powers.[1] In earlier stages of the European war every belligerent was a party to the agreement. Charges were frequently made, however, that the compact was not respected.[2]

Enlightened States are doubtless now in a position to determine with possible unanimity, the true principle which should restrict belligerent action. It must be clear that it is not the extent of injury or destruction capable of being wrought by a projectile so much as the nature of the harm which it produces which should be applied as the test of lawful conduct. Thus an explosive bullet or shell, by reason of its potentiality in destroying human life, is an instrumentality to be utilized rather than relinquished.[3] On the other hand, it seems apparent that bullets which primarily rather than incidentally inflict wounds of useless cruelty, such as expansive bullets, offer no military advantage commensurate with the harm inflicted, and hence belong to a class of instrumentalities to be looked upon with disapproval.

It is believed that the American proposal at the First Hague Peace Conference was sound in principle and manifested the nature of what should be avoided, even though the reference to explosive bullets may not have been an apt illustration. Explosive projectiles, whether in the form of bullets or shells or hand grenades, are now doubtless deemed to possess a military value such as to retard general opposition to their use.[4] The employment of mines and

[1] See Report of Mr. van Karnebeek from the First Commission to the Conference, *Conférence Internationale de la Paix*, Part I, 83.

See also Oppenheim, 2 ed. II, §112.

Concerning uses of expanding bullets in the course of the South African and Russo-Japanese wars, see bibliographical notes in *Bonfils-Fauchille*, 7 éd. §1069, and in Hershey, p. 391. See also J. M. Spaight, War Rights on Land, 79–81.

[2] See, for example, Reports of British officers in Oct. and Nov., 1914, respecting German uses of expanding bullets in East Africa. (Papers Relating to German Atrocities and Breaches of the Rules of War, in Africa [Cd. 8306], 5 and 17.)

See also Mr. Bryan, Secy. of State, to Mr. Stone, chairman of the Senate Committee on Foreign Relations, Jan 20, 1915, in response to an inquiry whether the United States had suppressed the alleged sale of dum-dum bullets to Great Britain. American White Book, European War, II, 58, 60.

[3] Declares J. M. Spaight: "It is really by its fruits that the engine of war is judged. The test of the lawfulness of any weapon or projectile is practically the answer one can give to the question: What is its 'bag'? Does it disable so many of the enemy that the military end thus gained condones the suffering it causes? To-day, a commander has an acknowledged war right to use any weapon or explosive which, however terrible and ghastly its effects, is capable of putting out of action such a number of the enemy as to justify the incidental mutilation of individuals." War Rights on Land, 76 and 77.

[4] See Rules of Land Warfare, §§ 175 and 185.

Poison. § LXX, of Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, Apr. 24, 1863, declares that "The use of poison in any manner, be it to poison wells or food or arms is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war." (Moore, Dig., VII, 179.) "To employ poison or poisoned weapons" is forbidden by Article XXIII(a) of the Hague Regulations. (Malloy's Treaties, II, 2285.) According to the Rules of Land Warfare, § 177: "This prohibition extends to the use of means calculated to spread contagious diseases, and includes the deliberate contamination of sources of water by throwing into the same dead animals and all poisonous substances of any kind, but does not prohibit measures being taken to dry up springs or to divert waters and aqueducts from their courses."

See Mr. Andrews, American chargé d'affaires in Roumania, to Mr. Lansing, Secretary of State, Feb. 9, 1917, with documents disclosing discovery of phials containing cultivations of the microbes of anthrax and glanders buried in the garden of the German legation at Bucharest (Official Bulletin, Sept. 29, 1917, No. 120, p. 9).

See correspondence between General Louis Botha and German military authorities in German Southwest Africa in 1915, relative to the poisoning of wells by the latter. (Papers Relating to Atrocities and Breaches of the Rules of War [Cd. 8306] 74–80.)

torpedoes in land warfare is likely to be similarly regarded.[1] It can not be said that enlightened States at the present time are of opinion that any legal duty forbids reliance upon such instruments of warfare. In the formulation of fresh rules of restraint the burden rests upon interested States, in the light of both medical and military opinion, to indicate a reasonable application of the underlying principle involved.

(3)

ASPHYXIATING OR DELETERIOUS GASES.

By a declaration of the First Hague Peace Conference the contracting parties agreed to forbid the employment of projectiles having for their sole purpose the diffusion of asphyxiating or deleterious gases.[2] The American delegation opposed the declaration.[3] The United States has not acceded to it.

Such gases were used offensively in the course of the European War. Among the devices employed in releasing them were fires lighted in front of the enemy's trenches, receptacles hurled either by hand or by mechanical means, tubes emitting gases, as well as shells containing them.[4] They produced a deleterious effect upon all persons within a wide area who were not equipped with apparatus specially designed to afford protection from the fumes. The fact is significant that Germany was not deterred by the declaration of 1899 from resorting to noxious gases at an early stage of the conflict. When that belligerent proved the efficacy of such instrumentalities, its enemies were disposed to follow in its lead, although the sufferings of disabled men were thereby aggravated.[5]

[1] Concerning the use of explosive bullets by the Confederates at Vicksburg in 1863, see U. S. Grant Memoirs, 316 (quoted in J. M. Spaight, War Rights on Land, 78–79).

[2] See *Conférence Internationale de la Paix*, 254.

[3] The reasons for opposing the declaration were expressed by Capt. Mahan, of the American delegation, as follows: "1. That no shell emitting such gases is as yet in practical use, or has undergone adequate experiment, consequently a vote taken now would be taken in ignorance of the facts as to whether the results would be of a decisive character, or whether injuries in excess of that necessary to attain the end of warfare, the immediate disabling of the enemy, would be inflicted. 2. The reproach of cruelty and perfidy, addressed against these supposed shells, was equally uttered formerly against firearms and torpedoes, both of which are now employed without scruple. Until we knew the effects of such asphyxiating shells there was no saying whether they would be more or less merciful than missiles now permitted. 3. That it was illogical, and not demonstrably humane, to be tender about asphyxiating men with gas, when all were prepared to admit that it was allowable to blow the bottom out of an ironclad at midnight, throwing four or five hundred men into the sea to be choked by water, with scarcely the remotest chance of escape. If, and when, a shell emitting asphyxiating gases alone has been successfully produced, then, and not before, men will be able to vote intelligently on the subject." (F. W. Holls, Peace Conference at the Hague, 494–495, Bordwell, 134–135.)

[4] See Official Commission of the Belgian Government, Reports of the Violation of the Rights of Nations and of the Laws and Customs of War, II, 18–20, Fourteenth Report, on the Use of Asphyxiating Gas, April 24, 1915.

[5] While this procedure on the part of the enemies of Germany may have been attributable at the outset, to a design of retaliation, the employment of gases perfected in England and America proved of so great offensive value as to convince military opinion in those countries that such instrumentalities were generally desirable for use in land warfare.

The war correspondent of the London Times, under date of June 8, 1917, describing the British offensive at the Battle of Messines declared: "We did not use gas in the attack, but every other known form of

In view of the military value of various gases for offensive purposes, it may be doubted whether the technical advisers of the most enlightened States will be disposed to encourage acquiescence in a general arrangement prohibiting the employment of such a means of injuring a foe. It is to be anticipated, therefore, that any restrictions to be imposed upon belligerent action will assume the form of prohibitions designed to forbid the use of gases productive of more than a temporary effect upon individuals exposed to their fumes.

(4)

DISCHARGE OF PROJECTILES FROM AIRCRAFT.

According to a declaration of the First Hague Peace Conference, the contracting parties agreed to prohibit, for a period of five years, the launching of projectiles and explosives from balloons, or by other new methods of a similar nature.[1] A declaration of the Second Hague Peace Conference of 1907, extended the prohibition until the close of the Third Peace Conference yet to convene.[2] To both declarations the United States was a party. The smallness of the number of the adherents to the declaration of the second Conference made it evident that the weight of opinion was opposed to the broad restraint expressed therein.[3] The action of the first Conference was founded upon the opinion that balloons, as they then existed, could not be used with accuracy, and that the persons or objects injured by the dropping of explosives might be entirely disconnected with any conflict which might be in progress, and such that their injury or destruction would be of no practical advantage to the party making use of the machines.[4]

The European War has established the use of aircraft as an effective aid to a belligerent in directing the operations of an army or a fleet,[5] and also as a weapon of offense. When employed in the latter capacity, difficulties in regard to accuracy in throwing projectiles, which were

offensive weapon, I think, we did employ, including a new horror known in the Army as 'oil cans' or 'boiling oil,' of which it is not permissible to give a description beyond saying that it throws to a considerable distance projectiles which are, in fact, containers of highly inflammable stuff bursting on concussion and scattering conflagration over a wide area. We know from prisoners taken that they caused terror, and did an immense amount of harm, both in actual casualties and by starting innumerable minor fires." (London Times Weekly, June 15, 1917, p. 492.)

[1] See Malloy's Treaties, II, 2032.

Concerning early uses of balloons in warfare, see Stockton (355); Bonfils-Fauchille (7th ed. §1440); W. E. Ellis, "Aerial Land and Aerial Maritime Warfare" (American Journal, VIII, 261).

[2] Malloy's Treaties, II, 2366.

[3] As the declaration was "only binding on the contracting powers in case of war between two or more of them," its technical and actual operation as a deterrent proved to be negligible in a conflict in which several belligerents had not placed themselves under the restrictions of the convention.

[4] See report of Capt. Crozier, of the American delegation (F. W. Holls, Peace Conference at The Hague, 509; Bordwell, 130).

[5] The British army, for example, profited much from the directions obtained from aircraft in connection with the battle of Messines in June, 1917. (See London Times Weekly, June 15, 1917.)

anticipated in 1899, remain in part unsolved, and are even enhanced by the tendency to conduct operations from a high elevation as a means of avoiding attacks launched from anti-aircraft weapons. It has been, however, the abuse of the power committed to aircraft rather than difficulties inherent in their use, of which complaint is chiefly and justly made. Germany has frequently employed such weapons for the purpose of making raids over enemy territory with the apparent design of terrorizing the civil population, and with indifference as to the occupation, sex, or age of those to be the victims of its ruthlessness. The injustice of such procedure must be obvious, for the acts committed have borne but a remote relation to the achievement of any military end.[1]

The right of a belligerent to employ aircraft for the purpose of attacking military, naval, or aerial establishments or implements of any kind must be admitted.[2] It rests, however, upon military men, in the light of the European War, to devise and agree upon measures which will so restrict the dropping of projectiles upon places or things reasonably subject to destruction as to minimize danger to the noncombatant individual or neighborhood; and it rests upon statesmen to achieve the even more perplexing task of preventing in fact the commission by aircraft of acts which it is agreed should be forbidden. In the formulation of restrictive rules, the respective equities of combatants in the air and of noncombatants below must be carefully estimated. The applicability of certain general principles obtaining in warfare between forces on the earth needs consideration. Close proximity to an object subject to destruction such as a fortress or an arsenal, must weaken the complaint of him who suffers in consequence of an attack upon it. It is suggested that in order to prevent needless and improper injury or death to the noncombatant population of a town or community containing a place or thing subject to destruction, the latter should be marked with a distinctive sign, visible by night or day to an aircraft at a high elevation. Otherwise the latter should not be charged with abuse of power if causing severe harm to a noncombatant population in the endeavor to destroy for a military purpose some instrument of war but dimly perceived or uncertainly located. In a word, the method commonly employed in assuring the immunity of a hospital from attack should be applied

[1] The German air raid over London in June, 1917, caused the destruction of numerous children at school, as well as other noncombatants, and appeared to be designed for the accomplishment of no military object as such.

The Institute of International Law in 1911 adopted an article to the effect that aerial war is allowed, but on the condition that it does not present for the persons or property of the peaceful population greater dangers than land or sea warfare. (*Annuaire*, XXIV, 346; J. B. Scott, Resolutions, 171.)

[2] "There is no prohibition in The Hague rules or in other conventions against throwing authorized projectiles from balloons or aeroplanes into forts and fortified places." (Sec. 215, Rules of Land Warfare.)

conversely, when everything within a given area is to be immune save a particular place which is justly subject to destruction.[1]

It is urged with force that Article XXV of The Hague regulations annexed to the convention of 1907, respecting the Laws and Customs of War on Land, forbidding the bombardment "by whatever means" of undefended towns, villages, houses, or dwellings,[2] is applicable to operations of belligerent aircraft.[3] Even if this be true, the article appears, nevertheless, to respond inadequately to existing conditions, because of the difficulty in determining what constitutes an undefended place in aerial warfare, and because of the absence of any provision acknowledging the right to direct attack, in places regarded as either defended or undefended, upon structures or things which by reason of their military importance the enemy may reasonably endeavor to destroy.[4] If that work of destruction is necessarily attended with danger to a population living in close proximity, the complete immunity of the latter can only be effected by the removal from their midst of that which may be justly subjected to attack.[5]

g.

Prohibition of Certain Measures Respecting the Treatment of An Enemy Person—Denial of Quarter.

According to the Instructions for the Government of the Armies of the United States in the Field, of 1863, and the Rules of Land Warfare of 1917, the law of war disclaims all cruelty, as well as all acts of private revenge, or connivance at such acts, and all extortions.[6] Nor does it allow proclaiming either an individual belonging to the hostile army, or a citizen or a subject of the hostile Government an outlaw, who may be slain without trial by any captor, "any more than the modern law of peace allows such intentional outlawry; on the contrary, it abhors such outrage."[7] Civilized nations, it is said, look with horror upon offers of rewards for the assassination of enemies, as relapses into barbarism.[8]

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[1] It is not intended to be suggested that the equities of the noncombatant population of towns containing military works, such as navy yards, arsenals, etc., with respect to hostile aircraft, were, in the course of the European War, to be measured by tests which ought thereafter to be applied. Such works had frequently been placed in densely populated districts believed to be remote and safe from attack. Air raids had not been anticipated. When they were made the noncombatants were helpless and common victims. The absence or failure of effort of German aircraft to confine attack in the course of raids over England to objects reasonably subject thereto, weakened the value of the pretension that any military achievement was the end in view. If anti-aircraft devices were employed in self-defense against the raider bent on terrorization, it did not on principle set him free to bring death upon any object of his caprice.

[2] See Malloy's Treaties, II, 2286.

See a'so Sieges and Bombardments.

[3] See Sec. 213, Rules of Land Warfare, quoting Jacomet, Art. LXIII.

[4] See interesting discussion by J. W. Garner, in Am. Journal (IX, 93, 98-101).

[5] See J. M. Spaight, Air Craft in War, 15-23.

[6] See General Orders, No. 100, Apr. 24, 1863, (sec. XI, Moore, Dig. VII, 197); also section 18, Rules of Land Warfare.

[7] See section CXLVIII, General Orders, No. 100, of 1863 (Moore, Dig. VII, 198).

[8] See section 179, Rules of Land Warfare.

The regulations annexed to The Hague Convention of 1907 respecting the Laws and Customs of War on Land expressly forbid a belligerent to "kill or wound treacherously individuals belonging to the hostile nation or army; to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion; to declare that no quarter will be given."[1] It is believed that these prohibitions may be regarded as fairly declaratory of the law of nations. It should be observed, however, that while the Instructions for the Government of Armies of the United States in the Field, of 1863, denounced any resolution "in hatred and revenge" to give no quarter, a commander was permitted to direct his troops to deny quarter, if in great straits, "when his own salvation" made it "*impossible* to cumber himself with prisoners."[2] It was also declared that all troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none,[3] and that troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.[4] These instructions are now, however, declared to be superseded by The Hague regulations.[5]

From the experience of the European War military observers are doubtless now in a position to indicate with precision the narrow circumstances, if any, when quarter should be denied, and to devise measures to restrict those who, from motives of revenge or cruelty, may be indisposed to spare a helpless foe.[6] It is suggested, with

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[1] See Article XXIII (b), (c), and (d) (Malloy's Treaties, II, 2285).

[2] See General Orders, No. 100, Apr. 24, 1863 (sec. LX, Moore, Dig. VII, 199).

Declares Oppenheim: "But it must be emphasized that the mere fact that numerous prisoners can not be safely guarded and fed by the captors does not furnish an exceptional case to the rule, provided that no vital danger to the captors is involved therein." (2 ed. II, sec. 109.)

One Brig. Gen. S. of the United States Army, in 1901, gave the following oral instructions to a subordinate officer engaged in a punitive movement rendered necessary by the treacherous massacre of an American force at Balangiga, in Samar, in September, 1901: "I want no prisoners. I wish you to kill and burn; the more you kill and burn the better you will please me." Concerning the court-martial and retirement of Gen. S., and the comments of President Roosevelt, and Mr. Root, Secretary of War, see Senate Document 213, 57th Cong., 2d sess. 2, 3, 5 (Moore, Dig. VII, 187–190).

[3] See LXII, General Orders, No. 100 (Moore, Dig. VII, 199).

[4] See section LXII (id., Moore, Dig. VII, 199).

[5] See section 183, note 1, Rules of Land Warfare. It should be observed, however, that section LXII of General Orders, No. 100, noted in the text, has been utilized as section 368 of the Rules of Land Warfare as one of the "Penalties for Violations of the Laws of War."

[6] According to section LXXI, General Orders, No. 100, embodied also in section 181, Rules of Land Warfare: "Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States or is an enemy captured after having committed the misdeed." (See also id. sec. 366.)

The European War has presented no more impressive fact and none more influential in arousing a sense of outrage throughout the United States than the complete failure of any law, conventional or otherwise, to deter German forces in Belgium in 1914 from killing and injuring disabled and helpless enemy persons, combatant and noncombatant. Reports to the Official Commission of the Belgian Government on the Violation of the Rights of Nations and of the Laws and Customs of War (Vol. II, 20–69), and the Report of the Bryce Committee on Alleged German Outrages (Appendix, 187–201), reveal a spirit in the German Army utterly opposed to the theory on which enlightened States have developed their practice and formulated their agreements. Until German military authorities perceive, possibly through the aid of external force, the inherent defect of their philosophy, and pay some penalty for yielding to its precepts, it is not to be anticipated that German troops will hereafter, when occasion arises, be restrained from the commission of acts which sullied their reputation from the moment their State became a belligerent in 1914.

greatest deference for military opinion, that inasmuch as denial of quarter is at best a measure of self-defense or retaliation, the omission from regulations of warfare of reference to such conduct as a form of legitimate procedure, might diminish the number of cases where recourse thereto was had. Silence as to the existence of a possible excuse, rarely if ever to be utilized, might serve to minimize the occasions when it would be in fact invoked.[1]

h.

INCITING ENEMY TROOPS TO DESERTION, TREASON, AND INSURRECTION.

According to Prof. Westlake it is considered unlawful to incite the enemy's troops to treason or desertion—a rule which he declares was "probably introduced for the mutual convenience of commanders and by a kind of chivalry between them, and which should carry with it the unlawfulness of enrolling deserters as recruits." [2] It may be doubted whether any belligerent in the European War felt itself restricted by a legal duty not to pursue such a course. The Rules of Land Warfare of 1917 appear to sanction such conduct.[3]

The attempt to weaken the power of the enemy in the field by fomenting discord of any kind among his troops seems to be as legitimate as the endeavor to accomplish the same end by placing them *hors de combat*. Moreover, when it is believed by one belligerent that the opposing forces are compelled by military authority to battle for the preservation of a dynasty, and the maintenance and extension of autocratic government as such, rather than for the aspirations of a people, it is not, from an American point of view, unreasonable or unwise to bring home to the soldiers as well as the civilians of the enemy an understanding of what the success of their own arms may have in store for those who bear them.[4]

To incite insurrection in the territory of the enemy is not deemed to be contrary to the law of nations.

i.

RETALIATION.

Retaliation in land warfare refers to a single form of that broad and grave procedure whereby a belligerent State endeavors to check

[1] According to section 183, Rules of Land Warfare: "It is no longer contemplated that quarter will be refused to the garrison of a fortress carried by assault, to the defenders of an undefended place who did not surrender when threatened with bombardment, or to a weak garrison which obstinately and uselessly persevered in defending a fortified place against overwhelming odds."

[2] See Int. Law, 2 ed. II, 83, quoted in Hershey, 395, note 57.

[3] See 191, Rules of Land Warfare.

[4] Upon the entrance of the United States into the European war in April, 1917, the declarations of President Wilson describing the country as the protagonist of democracy and the foe of the autocratic powers in control of Germany rather than withthe people of that country were of a nature to encourage opposition to the Hohenzollern rule on the part of soldiers and civilians alike. The effort, if any, through whatsoever channel, to bring his words to knowledge of men in the German trenches was a direct and reasonable means of endeavoring to weaken a system of government against which the United States had resorted to arms.

the illegal conduct of the enemy by recourse to measures supposedly similar in kind. In justification it is pleaded that a belligerent which violates the law forfeits the right to claim respect for it by its foe.[1]

In land warfare the opportunity for a commanding officer to exercise discretion in resorting to retaliation is narrow, because such procedure, by reason of the serious consequences which it may entail, is commonly determined by the highest authorities of the State, and when agreed upon, leaves the commander in the field no alternative.[2] The right, therefore, of such an officer, as a matter of domestic as well as international law, to resort to the excesses of the enemy as a means of causing their abatement, must be limited to occasions when no other effective deterrent is available.[3]

According to the Rules of Land Warfare, "retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and, moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution."[4]

The punishment of captured enemy persons for having violated the laws of war may suffice to deter the commission of reprehensible acts and so remove the necessity of retaliation. It should be observed, however, that retaliation does not purport to be the imposi-

[1] See Retaliation in General, supra.

The regulations annexed to The Hague convention of 1907, respecting the Laws and Customs of War on Land contain no provisions concerning retaliation.

[2] See, for example, the retaliatory treatment of British prisoners in the United States in the War of 1812, as indicated in Wharton, Dig., III, 330, citing Am. State Papers, For. Rel, III, 630, and quoted in Moore, Dig., VII, 182.

See also Correspondence between Vice Admiral Cochrane of the British Navy, and Mr. Monroe, Secy. of State, in August and September, 1814, respecting the destruction of American coast towns by the former pursuant to the request of the Governor General of the Canadas "to aid him in carrying into effect measures of retaliation against the inhabitants of the United States for the wanton destruction committed by their army in Upper Canada." American State Papers, For. Rel. III. 693, 694, Moore, Dig., VII, 183-186.

[3] Thus where the enemy disclaims intentional violation of the laws of war, or a readiness to grant reparation for injuries committed in consequence of so doing, or a willingness to enter into a reciprocal arrangement to prevent a recurrence of acts complained of, the reason for retaliation disappears. See in this connection the communication of Mr. Monroe, Secy. of State, to Vice Admiral Cochrane, Sept. 6, 1818, American State Papers, For. Rel. III, 693, Moore, Dig., VII, 184.

Declares Gen. Davis: "A general who suffers a wrong at the hands of an enemy, or who finds that his enemy has violated any of the accepted usages of war, addresses him a communication setting forth the facts which constitute his ground of complaint. If no explanation or apology is attempted, or if the enemy assumes the responsiblity of the act, he is justified in resorting to measures of retaliation. In choosing a means of retaliation, revenge can not enter into the consideration or decision of the question. His sole purpose must be to constrain his adversary to discontinue the irregular acts complained of. Unless the enemy's act be in gross violation of the dictates of humanity, he must retaliate by resorting to the same or similar acts in his military operations." (3 ed., 326, citing Woolsey, §132; Risley, p. 126; Field, International Code, §§758, 759.)

See J. M. Spaight, War Rights on Land (Chap. XIV., on the Sanction of the Laws of War).

[4] See § 381, where it is added that "Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages." See § XXVIII, General Orders, No. 100, of April 24, 1863.

tion of a penalty as such,[1] but merely a preventive which may, of necessity, demand the application of severe measures against persons themselves guilty of no wrongful conduct.[2] This circumstance emphasizes the great caution with which commanding officers should permit themselves to return lawlessness for lawlessness, and the zeal with which, despite grave provocation, they should endeavor to restrain their subordinates from the commission of even retaliatory acts of cruelty.[3]

Where the lawlessness of a hostile army takes the form of acts which disregard the laws of humanity and morality, the return of like for like can give no cause of umbrage to the former. Doubtless in dealing with certain uncivilized tribes no milder response may serve to check atrocities. When, however, the army of an enlightened state, in the course of retaliation, resorts to acts of barbarity which its enemies do not hesitate to commit, it not only sinks to the level of its foes, but also establishes a precedent which sullies the profession of arms and weakens the efforts of other forces under the same flag to pursue a finer course. For that reason it seems important, especially in view of reported occurrences of the European War, that the highest military authorities of every belligerent state should, upon the outbreak of hostilities, make known to all subordinates certain forms of conduct which acts of retaliation should never be permitted to assume.[4]

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[1] See Stockton, Outlines, 330.

[2] § 59 of General Orders, No. 100, of Apr. 24, 1863, declared that "All prisoners of war are liable to the infliction of retaliatory measures." This language has been incorporated in the Rules of Land Warfare, § 383, and is followed by the statement that "Persons guilty of no offense whatever may be punished as retaliation for the guilty acts of others." It may be doubted whether this sentence was intended to signify more than that innocent persons might be subjected to retaliatory measures.

[3] "I am well aware of the danger and great difficulty of the task our Army has had in the Philippine Islands, and of the well-nigh intolerable provocation it has received from the cruelty, treachery, and total disregard of the rules and customs of civilized warfare on the part of its foes. I also heartily approve the employment of the sternest measures necessary to put a stop to such atrocities and to bring this war to a close. It would be culpable to show weakness in dealing with such foes or to fail to use all legitimate and honorable methods to overcome them. But the very fact that warfare is of such character as to afford infinite provocation for the commission of acts of cruelty by junior officers and the enlisted men, must make the officers in high and responsible positions peculiarly careful in their bearing and conduct so as to keep a moral check over any acts of an improper character by their subordinates." (President Roosevelt, approving the findings and sentence of the court-martial in the case of one Brig. Gen. S., Senate Doc. 213, 57 Cong., 2 sess. 3, Moore, Dig., VII, 188.)

[4] According to Art. LXXXVI, of the Manual of the Institute of International Law of 1880, on the Laws of War on Land: "In grave cases in which reprisals [signifying acts of retaliation] appear to be absolutely necessary, their nature and scope shall never exceed the measure of the infraction of the laws of war committed by the enemy.

"They can only be resorted to with the authorization of the commander in chief.

"They must conform in all cases to the laws of humanity and morality." (*Annuaire*, V. 157, 174; J. B. Scott, Resolutions, 42.)